Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

October Term, 1996

MARILYN R. HATCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual, charged with a federal crime, is entitled to a jury trial where the maximum penalty of six months in jail and a $10,000 fine exceeds Congress' definition of "petty" offense.

2. Whether a federal statute proscribing non-violent obstructive protest, only if the protest is motivated by a particular political message, violates the First Amendment of the United States Constitution.

3. Whether criminal legislation, enacted pursuant to Congress' Commerce Clause authority, proscribing non-commercial, non-violent obstructive protest and containing no jurisdictional element requiring proof of a nexus with commerce, exceeds Congress' Commerce Clause power thereby offending the doctrine of enumerated powers and the Tenth Amendment of the United States Constitution.

LIST OF PARTIES

The parties to the United States District Court for the Eastern District of Wisconsin were Ronald D. Brock, James D. Soderna, Michael C. Suhy, Dale R. Pultz, Colin L. Hudson, Marilyn R. Hatch, and the United States of America. The parties to the United States Court of Appeals for the Seventh Circuit are the same but for Ronald D. Brock who abandoned his appeal.

Petitioner is an individual and has no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Marilyn R. Hatch, by and through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 82 F.3d 1370 (7th Cir. 1996), is at Appendix A. The decision and order of the United States District Court for the Eastern District of Wisconsin (Stadtmueller, D.J.), reported at 863 F. Supp. 851 (E.D. Wis. 1994), is at Appendix B.

JURISDICTION

This case seeks review of a decision of the Court of Appeals for the Seventh Circuit entered on April 30, 1996. App. A. This is a criminal case.

Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have the power . . . To regulate Commerce with foreign nations, and among the several States, and the Indian Tribes."

2. Article III, Section 2, Clause 3, of the Constitution states: "The Trial of all Crimes . . . shall be by Jury . . . ."

3. The First Amendment of the Constitution states: "Congress shall make no law . . . abridging the freedom of speech."

4. The Fifth Amendment of the Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

5. The Sixth Amendment of the Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

6. The Tenth Amendment of the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

7. 18 U.S.C. § 19. Petty offense defined.

As used in this Title, the term "Petty offense" means a "Class B misdemeanor, . . . for which the maximum fine is not greater than the amount set forth in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization."

8. 18 U.S.C. §§ 3571(b)(6) & (c)(6). Sentence of fine.

(b) Fines for individuals -- . . . an individual who has been found guilty of an offense may not be fined more than the greatest of --

(6) For a Class B or C misdemeanor that does not result in death, not more than $5,000.

(c) Fines for Organizations-- . . . an organization that has been found guilty of an offense may not be fined more than the greatest of --

(6) For a Class B or C misdemeanor that does not result in death, not more than $10,000.

9. 18 U.S.C. § 3559(a)(7). Sentencing classification of offenses.

(a) Classification--An offense that is not specifically classified by a letter grade in the Section defining it, is classified if the maximum term of imprisonment authorized is --

(7) six months or less but more than 30 days, as a Class B misdemeanor.

10. The Freedom of Access to Clinic Entrances Act ("FACE"), codified at 18 U.S.C. § 248, provides in part:[1]

(a) Prohibited Activities. - Whoever -

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . shall be subject to penalties. . . .

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[1] The text of the statute is reprinted in full at Appendix C.

(b) Penalties. . . .

> [F]or an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall not be more than six months, or both, for the first offense . . . .

STATEMENT OF THE CASE

On June 4, 1994, two individuals pushed a disabled car in front of the southern entrance of a Milwaukee abortion clinic. They then handcuffed themselves in and to the car. Three other individuals, in a like manner, obstructed access to the northern entrance of the clinic. Petitioner Hatch and several others then arrived at the scene. Hatch, however, unlike her comrades, walked across the street to the northern entrance of the clinic, climbed over the car and sat down in the entryway. There she displayed a sign conveying her opposition to abortion. Throughout the course of this demonstration, all the individuals were passive and displayed no violence. It took the city fire department about two hours to clear an entryway before clinic staff and clientele could access the facility.

Two days later, Petitioner Hatch and the five individuals affixed to the cars were charged with violating the Freedom of Access to Clinic Entrances Act ("FACE"), codified at 18 U.S.C. § 248(a)(1). The information alleged that all defendants, by exclusively nonviolent conduct, physically obstructed access to a reproductive health clinic. If convicted each faced a maximum penalty of six months in jail and a $10,000 fine. Because the penalty Hatch faced exceeded Congress' definition of "petty" offense, she requested a jury trial. She also filed several motions challenging the constitutionality of FACE under the First Amendment. The district court denied all motions. After a bench trial, Hatch was convicted as charged. App. A at A-1-3.

A. The District Court Opinion

Jurisdiction for the district court was invoked under 28 U.S.C. § 1331. In denying Hatch's request for jury trial, the district court was persuaded that this Court and, in particular, the Seventh Circuit discouraged "excessive emphasis on the federal classifications." App. B at B-34. Although acknowledging Hatch's position as consistent with the approach taken by several circuit courts[2] and indeed, at times, this Court,[3] the district court nonetheless embraced the holding in *Muniz v. Hoffman*, 422 U.S. 454 (1975). App. B at B-34. In *Muniz*, the district court observed that this Court accorded "no talismanic significance" to Congress' definition of "petty" offense when denying an organization's claim to a jury trial.[4] Additionally, the court emphasized that the presumption against a jury trial, spoken of in *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), should rarely be punctured and should be strictly applied. *United States v. Nachtigal*, 507 U.S. 1, 5 (1993). The court finally concluded that the disadvantages of imposing a sentence without a jury were "outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." App. B at B-35.

In addressing the First Amendment issues raised by Hatch, the court first determined whether her conduct possessed sufficient communicative elements to entail expressive conduct. Employing the two part analysis for expressive conduct articulated in *Spence v. Washington*, 418 U.S. 405, 410 (1974), the court found that Hatch indeed met the *Spence* cri-

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[2] *See* note 9, *infra*.

[3] *See, e.g., Blanton v. City of North Las Vegas*, 489 U.S. 538, 545 n.11 (1989), wherein this Court "looked to the federal classification scheme in determining when a jury trial must be provided."

[4] The question presented in *Muniz* was "whether a fine of $10,000 against an unincorporated labor union found guilty of criminal contempt may be imposed after denying the union's claim that it was entitled to a jury trial under the Sixth Amendment." *Muniz*, 422 U.S. at 476.

teria in that she "intended to convey a particularized message" and that "her message was understood" by those present. App. B at B-12. What was most troubling to the court, however, was the "vehicle" (nonviolent physically obstructive protest) Hatch employed in delivering her message. App. B at B-12. Noting that a "limitless variety of conduct" cannot be labeled speech merely because one intends to convey a message thereby, *Wisconsin v. Mitchell*, 509 U.S. 476 (1993) App. B at B-9, and that demonstrators may not "insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations," *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), the district court concluded that Hatch's physically obstructive protest simply was not entitled to First Amendment protection. App. B at B-12. Lastly, finding FACE "justified without reference to the content of" any regulated speech and serving a governmental interest "unrelated to the suppression of free expression," App. B at B-25, the court dismissed Hatch's argument that FACE was an impermissible content and viewpoint based regulation.

The Commerce Clause issue, raised by a co-defendant at trial, was not briefed by Hatch until her appeal to the Seventh Circuit. Thus, the district court did not address this issue in its opinion.

B. The Appellate Court Opinion

Jurisdiction for the appellate court was invoked under 28 U.S.C. § 1291. The appellate court (1) applied the holding of *Muniz*, and agreed with the district court that Hatch was not entitled to a jury; (2) found that, though Hatch's conduct constituted expressive activity, it produced "harm distinct from its communicative impact," thus entitling it to no constitutional protection under the First Amendment, *Wisconsin v. Mitchell*, 508 U.S. 476, 484-85; and (3) relied on the recent decision of *United States v. Wilson*, 63 F.3d 675 (7th Cir.

1995), opined that in enacting FACE Congress did not exceed its authority under the Commerce Clause.

REASONS FOR GRANTING THE PETITION

Title 18 U.S.C. § 248(a)(1) implicates issues broad in scope and of exceptional importance. First, review is sought to ensure uniformity among the circuits regarding an individual's right to jury trial. Persons charged under statutes with similar penalties receive disparate constitutional protections based solely upon the circuit in which they are accused.[5] Moreover, the Seventh Circuit stands alone in not relying on Congress' classification scheme when considering the seriousness of fines by individuals for purposes of jury trial. Review of this issue will guarantee consistent application of the Sixth Amendment to persons similarly accused.

Second, guidance from this Court is necessary to articulate the parameters of First Amendment protection specifically relating to statutes proscribing nonviolent obstructive protest, *only when said obstructive protest is effected with a particular motive or message*. The Court's present categorical distinctions between statutes regulating or proscribing "conduct" and those regulating or proscribing "speech" are difficult to distinguish and subject to manipulation. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). Furthermore, in holding that FACE is not subject to strict scrutiny under the First Amendment, the appellate court disregarded this Court's holding in *Cox v. Louisiana*, 379 U.S. 536 (1965). In *Cox*, this Court reversed defendants' conviction under a Louisiana "Obstructing Public Passages" statute on First Amendment grounds, notwithstanding that defendant clearly obstructed the

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[5] *See United States v. Lucero*, 895 F. Supp. 1419 (D. Kan. 1995), wherein the court granted a jury trial to defendants facing precisely the same charge as Petitioner Hatch. The United States Attorney did not appeal this issue.

sidewalk and violated the statute. The appellate court's misapplication of these cases has broad implications regarding government's ability to silence the voices of individuals engaged in such conduct, while simultaneously permitting identical obstructive protest if accompanied by a different, more palatable political message. The chilling effect of this type of legislation lies at the heart of the First Amendment and begs this Court's consideration.

Finally, review is sought to clarify whether the Tenth Amendment, as construed by this Court in *United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624 (1995), limits Congress' commerce-based criminal legislative power in any meaningful way. The standard applied by the appellate court in upholding FACE as a valid exercise of Congress' Commerce Clause authority misconstrues Commerce Clause jurisprudence and conflicts with the law articulated by this Court in *Lopez*. Accordingly, this Court should exercise this opportunity to evince the boundaries of Congress' enumerated powers and maintain the tenets of federalism firmly anchored in the Constitution.

I. The Appellate Court Erred in Denying Petitioner's Request for Jury Trial.

The Constitution requires jury trials for all criminal prosecutions,[6] except those involving "petty" offenses. *Callan v. Wilson*, 127 U.S. 540, 557 (1888). Whether an offense is classified as "petty" or "serious" should be determined "not subjectively, . . . but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937). If an offense carries a maximum jail period of not more than six months, the court presumes that the legislature and society

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[6] U.S. Const. art. III, § 2; U.S. Const. amend. VI.

view such an offense as "petty" and thereby deduces there is no right to jury trial. The accused, however, can overcome this presumption if she "can demonstrate that any additional statutory penalt[y], viewed in conjunction with the maximum authorized period of incarceration, [is] so severe that [it] clearly reflect[s] a legislative determination that the offense in question is a 'serious' one." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

For purposes of guiding federal courts regarding questions of jury trials, Congress set the maximum penalty for a "petty" offense for individuals at six months and $5,000.[7] This classification is a uniform objective standard.[8] Because the statutory penalty faced by Hatch exceeded these limits, one must conclude Congress classified this offense as "serious." Where legislatures have set maximum penalties, "[t]he judiciary should not substitute its judgment as to seriousness [of an offense] for that of a legislature." *Id.* at 541; *see also United States v. Nachtigal*, 507 U.S. 1, 3 (1993) (per curiam).

Seven circuits relying upon this Court's precedent have applied this classification scheme when considering the seriousness of fines faced by individual defendants for purposes of a jury trial.[9] Accordingly, neither precedent nor policy al-

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[7] 18 U.S.C. § 19 was intended to guide the courts in applying the constitutional right to jury trial. H.R. Rep. 300, 100th Cong., 1st Sess. 4-5 (1987).

[8] Congress' statutory definition of "petty offense" is provided in 18 U.S.C. § 19, to wit, "[A petty offense is] a Class B misdemeanor . . . for which the maximum fine is not greater than the amount set forth in section 3571(b)(6) . . . in the case of an individual . . . ." 18 U.S.C. §§ 3559(a)(7) and 3571(b)(6) define sentencing limits for petty offenses. Punishment for petty offenses committed by individuals may not exceed $5,000 in fines or six months in prison or both.

[9] *See, e.g., Douglass v. First National Realty Corp.*, 543 F.2d 894, 902 (D.C. Cir. 1976); *United States v. Time*, 21 F.3d 635, 642 (5th Cir. 1994); *United States v. Professional Air Traffic Controllers Org.*, 678

lows the Seventh Circuit to ignore the legislative determination that an offense is "serious" and not "petty" for purposes of a jury trial.

A. The Appellate Court is in Conflict with Seven Sister Circuits.

In denying Hatch's request for jury trial, the Seventh Circuit relied primarily on *Muniz v. Hoffman*, 422 U.S. 454 (1975). While recognizing that *Muniz* applied to a 13,000-member organization rather than an individual, the Seventh Circuit discounted this distinction as constitutionally insignificant, reflecting that "many individuals have more money than many organizations." App. A at A-14. The Seventh Circuit stands alone in this interpretation. Sister circuits in analyzing *Muniz* have concluded that a material difference does exist.

The Fifth Circuit initially interpreted *Muniz* as direction by this Court that only imprisonment, and not a fine, was important in determining whether a crime was "serious" or "petty." *Landry v. Hoepfner*, 840 F.2d 1201, 1216 n.30 (5th Cir. 1988). But, since this Court's decision in *Blanton*, the Fifth Circuit now looks to the congressional definition of "petty offense" in evaluating whether a heavy fine evidences legislative intent that the offense is "serious" for purposes of jury trial. *United States v. Time*, 21 F.3d 635, 642 (5th Cir. 1994).

The Tenth Circuit in *United States v. McAlister*, 630 F.2d 772 (10th Cir. 1980), also recognized that to err in favor of requiring a jury trial is to err properly on the side of protecting a constitutional right. "[U]nless the right to a trial by jury in cases such as this has been clearly abrogated by history and

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F.2d 1, 4-5 (1st Cir. 1982); *United States v. Troxler Hosiery Co.*, 681 F.2d 934, 936 n.2 (4th Cir. 1982); *United States v. McAlister*, 630 F.2d 772, 774 (10th Cir. 1980); *Girard v. Goins*, 575 F.2d 160, 164-65 (8th Cir. 1978); *United States v. Hamdan*, 552 F.2d 276, 278-80 (9th Cir. 1977).

reason, a defendant should have the benefit of the constitutional protection." *Id.* at 774. Petitioner Hatch requests that this Court grant her the same benefit.

B. The Appellate Court Misconstrued Supreme Court Precedent.

Not only is the decision of the appellate court at variance with its sister circuits, but it substitutes its judgment as to the "seriousness" of Hatch's offense for that of the legislature and misconstrues this Court's precedent.

In its review of *Blanton*, 489 U.S. 538, wherein this Court found a maximum jail term of six months, and a fine of up to $1,000 to be "petty," the Seventh Circuit noted that the fine faced by Hatch, $10,000, "is not so much higher as to make *clear* that Congress considered" this offense "serious." App. A at A-13. (emphasis in original). What it would take to evince congressional intent that indeed Hatch's offense was "serious" for purposes of jury trial, the Seventh Circuit did not state. What was clear, however, was that they would not look to 18 U.S.C. § 19 for clarification.

Moving next to *United States v. Nachtigal*, 507 U.S. 1 (1993), the Seventh Circuit claimed: (1) that a fine five times greater than the one in *Blanton* (i.e., $1,000 vs. $5,000) plus a six month sentence was still "petty," and (2) that five years' probation plus a $5,000 fine is "petty" yet more severe than Hatch's potential six months plus a $10,000 fine. Again, the appellate court pointed to no objective criteria for its conclusion. Most problematic to the court's analysis is that, in both *Blanton* and *Nachtigal*, the potential penalty faced by the defendants never exceeded Congress' definition of a "petty" offense. Moreover, this Court reaffirmed reliance on legislative guidance. *See Blanton*, 489 U.S. at 545 n.11 and *Nachtigal*, 507 U.S. at 3-4.

Perhaps recognizing that its analysis might be less than tenable if scrutinized by this Court, the appellate court stated, "[i]f we have misunderstood those decisions, the Supreme

Court knows how to straighten us out." App. A at A-15. Petitioner urges this Court to do so.

II. The Appellate Court Erred in Refusing to Evaluate FACE Under The First Amendment.

The appellate court erred in concluding that the nonviolent physically obstructive conduct proscribed by FACE lacks claim against content discrimination under the First Amendment. Acknowledging Hatch's conduct was "expressive," the court noted that because such expression was effected via physical obstruction, "the [A]mendment does not extend its protection . . ., where the picketer physically impedes entry to the picketed premises." App. A at A-7.

Hatch concedes the First Amendment does not prohibit Congress from proscribing obstructive conduct. *Cameron v. Johnson*, 390 U.S. 611, 615-17 (1968). Likewise, the First Amendment does not protect violence. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). However, it is repugnant to the First Amendment to carve out a particular aspect of nonviolent expressive conduct, prescribe a set of approved messages to be associated with such expression, and proscribe others.[10] Although ideas communicated via physical obstruction generally are not protected under the First Amendment, the constitutionality of a statute proscribing physical obstruction in a discriminatory manner is subject to scrutiny under the First Amendment. *Cox v. Louisiana*, 379 U.S. 536 (1985). Significantly, in *Cox*, this Court reversed a conviction under a Louisiana "Obstructing Public Passages"

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[10] For example, an individual who intentionally interferes with a clinic by physical obstruction to protest the labor practices or environmental policies of a hospital does not violate FACE by its own terms. S. Rep. No. 117, 103d Cong., 1st Sess. 27 (1993).

statute[11] based upon the First Amendment,[12] wherein the Court found: "There is no doubt from the record in this case that this far sidewalk was obstructed, and thus, as construed, appellant violated the statute." *Id.* at 553. Certainly, if the conduct of two thousand protestors blockading a sidewalk in the early sixties qualified as expressive conduct warranting First and Fifth Amendment analysis of the statute, Petitioner Hatch's expressive conduct likewise warrants First Amendment analysis of FACE.

Hence, the appellate court erred in viewing "unprotected categories" as "invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 383-84 (1992) (emphasis omitted).

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[11] The statute states:

> No person shall willfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.
>
> Providing however nothing herein contained shall apply to a bona fide labor organization or to any of its legal activities such as picketing or lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions.

Cox, 379 U.S. at 553 (citing La. Rev. Stat. § 14:100.1 (Cum. Supp. 1962)).

[12] This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.

Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring).

A. The Appellate Court Misconstrued Supreme Court Precedent.

The appellate court failed to apply properly this Court's holdings in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). By equating Petitioner Hatch's nonviolent peaceful protest with "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact," *Mitchell*, 508 U.S. at 484-85 (citation omitted), the appellate court not only erroneously linked Hatch's alleged "harm" to her communication, but also wrongfully equated violent, assaultive action with nonviolent, passive action. In *Mitchell*, for purposes of criminal culpability, it did not matter why the defendant assaulted the victim. It only mattered that the victim suffered an assault or "harm." The elements of assault were proved, the gavel dropped and the defendant was guilty. The "communicative impact" of the assault was considered, for enhanced sentencing purposes, only after culpability for the harm attached.

The statute and facts in the instant case are unlike the statute and facts in *Mitchell*. FACE punishes "harm" (being obstructed from entering a clinic) *only if* the communicator of the nonviolent physical obstruction is motivated by a desire to prevent access *because* a person is seeking or providing reproductive services. Accordingly, FACE does not punish "harm" (physical obstruction) "distinct from its communicative impact." Rather it punishes "harm" (physical obstruction) only insofar as the "requisite communicative impact" flows from the "harm" (physical obstruction). Had Hatch's "harm" (physical obstruction) been the same but her message or motive been different, FACE would not apply. Furthermore, to equate nonviolent obstructive protest with aggravated battery exudes incredulity. Nonviolent obstructive protest, unlike the physically assaultive conduct in *Mitchell*, is inextricably intertwined with the rights of speech and petition and has long played a significant role in our national, social

and political history. *Mitchell* is inapposite, and the court erred in its application. This case, instead, should be controlled by *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). In *R.A.V.*, this Court held that an ordinance banning otherwise proscribable expressive conduct (trespassing on a black family's lawn and burning a cross) could not single out for punishment those who act with racial animus. *Id.* at 392.

B. FACE Is Impermissibly Content Based And Therefore Facially Invalid Under The First Amendment.

Where the government prohibits expressive conduct precisely because of its communicative attributes, the regulation is unconstitutional. *R.A.V. v. St. Paul, Minnesota*, 505 U.S. 377 (1992). "[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses . . . ." *Id.* at 385. Such content-based regulations of expressive conduct are presumptively invalid. *Id.* at 382.

Many political and social protestors have been arrested, convicted and sentenced under laws and ordinances prohibiting trespassing and disorderly conduct. The application of a generally applicable, content neutral law to political protests usually does not violate the First Amendment.[13] FACE, however, is not a generally-applicable, content-neutral law.[14] Congress, by adding the requirement that government examine the underlying political motive of the protesting obstructionist *before finding the conduct unlawful*, drafted a statute that unabashedly discriminates against a portion of society

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[13] *See, e.g., Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S. Ct. 2516, 2523 (1994) (concluding an injunction imposed against anti-abortion demonstrators was content-neutral where there was nothing in the record suggesting that Florida law would not equally restrain similar conduct having nothing to do with abortion).

[14] FACE "presents a distinct risk of censorship." *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996) (finding FACE unconstitutional under the First Amendment).

based solely upon the message conveyed.[15] With the specific intent element of "intentionally . . . because that person is or has been . . . obtaining or providing reproductive health services," App. C. at C-1, FACE prohibits expressive conduct precisely because of its communicative attributes.[16]

As a content-based restriction on expressive conduct, FACE must be subjected to strict scrutiny to determine whether the statute is necessary to serve a compelling governmental interest and whether it is narrowly tailored to achieve that end. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992). Content based regulations rarely pass strict scrutiny. *Id.* at 211.

The government asserts its compelling interests as, "ensuring access to reproductive health services and promoting the free flow of goods and services in interstate commerce."[17] Plainly, FACE is not narrowly drawn to achieve these interests. For like the statute struck down in *R.A.V.*, a statute proscribing all physical obstruction, not just obstruction limited to favored (or disfavored) topics, would have precisely the same effect.

> The existence of adequate content-neutral alternatives thus "undercut[s] significantly" any defense of such a statute, casting considerable doubt on the government's protestations that "the asserted justification is in fact an accurate description of the pur-

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[15] *Compare Frisby v. Shultz*, 487 U.S. 474 (1988) (upholding a content-neutral ban on targeted residential picketing against facial challenge) *with Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing).

[16] "FACE punishes certain conduct (...physical obstruction...) when it is motivated by a desire to stop someone from obtaining or providing abortion related services, *while providing no punishment at all for the same conduct engaged in for some other reason or for no reason.*" S. Rep. No. 117, 103d Cong., 1st Sess. 29 (1993) (emphasis added).

[17] Government's Response to Defendants' Pretrial Motions at 20.

> pose and effect of the law." . . . . In fact the only interest distinctively served by the content limitation is that of displaying the [government's] special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.

R.A.V., 505 U.S. at 395-96 (citations omitted).

C. FACE Is Impermissibly Viewpoint Based As Applied To Petitioner.

The constraints of First Amendment jurisprudence do not allow the government to impose unique burdens on expression associated with only one side of a debate over matters of public concern. *R.A.V.*, 505 U.S. at 393; *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993). For "discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination." *Rosenberger v. Rector and Visitors of the University of Virginia*, ___ U.S. ___, 115 S. Ct. 2510, 2517 (1995).

Petitioner's point is elementary. Had she participated in *exactly the same conduct* on June 4, 1994, but changed the viewpoint on her sign from "abortion kills children" to "abortion does not kill children," she would not be standing before this Court. For, by merely conveying a different viewpoint on her sign, she would not fall within the proscription of FACE. Where the application of the statute to specific instances of prohibited conduct is precisely because of the viewpoint communicated, the statute or regulation is unconstitutional. FACE, as applied to Petitioner Hatch, is such a statute.

III. The Appellate Court Erred in Upholding FACE Under The Commerce Clause.

The Decision of the appellate court is at variance with *United States v. Lopez*, _ U.S. _, 115 S. Ct. 1624 (1995), and

other precedent regarding the parameters of Congress' commerce-based criminal jurisdiction. The need for guidance from this Court is acute as three other circuits ruling on the constitutionality of FACE have found it valid.[18]

For the first time in nearly 60 years, this Court in *Lopez* invalidated a commerce-based criminal statute declaring it an unconstitutional exercise of Congress' Commerce Clause authority. Significantly, this was effected without overruling a single Commerce Clause case. In *Lopez*, this Court revisited the plethora of Commerce Clause precedent. After surgically dissecting and distinguishing these cases, the Court emerged with an articulable standard -- a test -- for determining whether a proscribed activity substantially affects interstate commerce, thus subjecting that activity to regulatory authority under Congress' commerce-based criminal legislation. Heretofore, what logically could be gleaned from commerce-based criminal legislation never had been articulated with the particularity this Court announced in *Lopez*.

Lopez held that the Gun-Free School Zone Act (a commerce-based criminal statute) exceeded Congress' authority to regulate conduct "substantially affecting interstate commerce" because the legislation neither (1) regulated economic activity nor (2) included as an element of the offense an interstate commerce nexus.[19] *Id.* at 1630-31.

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[18] *See United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), wherein, unlike the non-violent conduct charged in the instant case, the defendant was charged with committing acts of force or threats of force; *Cheffner v. Reno*, 55 F.3d 1517 (11th Cir. 1995), entailing a civil action requesting a declaratory judgment; *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 55 (1995), a circuit court decision pre-dating *Lopez*. *But see Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), holding FACE unconstitutional under both the Commerce Clause and the First Amendment.

[19] [The Gun-Free School Zone Act] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise. . . .[and] is not an essential part of a larger regulation of

Despite the fact that FACE regulates non-commercial conduct and lacks a jurisdictional nexus requirement, the Seventh Circuit upheld the Act, reasoning that, regardless of the commercial or non-commercial character of the proscribed conduct, the Act sought "to remove a significant obstruction . . . to the free movement of persons and goods across state lines." App. A. at A-4. In support of its conclusion, the court cited *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991). In *Summit*, this Court emphasized that the test was not the actual effect of the particular conduct but the potential effect over all the conduct subject to the statute. This case is inapposite and distinguishable because the antitrust statute under which the defendants were charged in *Summit* has a jurisdictional element requiring proof of an interstate commerce nexus. FACE does not have such an element. Furthermore, the hospital defendant is a commercial actor. Hatch is not.

Many federal criminal statutes passed pursuant to the Commerce Clause require proof of nexus with interstate commerce as an element of the offense where the class of activity prohibited is not generally regarded as commercial or transactional.[20] Such a limiting principle does not offend Supreme Court Commerce Clause jurisprudence, for this Court never has declared that Congress may use a relatively trivial

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> *economic activity*, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. . .[and] the statute contains no *jurisdictional element* which would ensure, through case by case inquiry, that the [proscribed conduct] in question affects interstate commerce.

Lopez, 115 S. Ct. at 1630-31 (emphasis added).

[20] Such statutes include 18 U.S.C. § 224 (bribery in sporting contests); 18 U.S.C. § 844(i) (Anti-Arson Act); 18 U.S.C. §§ 921, 922 (crimes related to firearms); 18 U.S.C. § 1201(a)(1) (kidnaping); 18 U.S.C. § 1462 (transportation of obscene materials); 18 U.S.C. § 1951 (Hobbs Act); 18 U.S.C. § 1962 (RICO); 18 U.S.C. § 2312 (transportation of stolen vehicles); 18 U.S.C. § 2314 (transportation of stolen goods); 18 U.S.C. § 2421 (Mann Act).

link to interstate commerce as an excuse for broad regulation or prohibition of private activity. This principle, instead, establishes outer boundaries upon an otherwise unlimited congressional authority to enact federal criminal statutes under the Commerce Clause.

The standard employed by the Seventh Circuit in this case would uphold the Gun-Free School Zone Act, leaving nothing beyond the reach of Congress' regulatory power. The decision of the appellate court has no principled limits nor does the appellate court allude to any limits. To the extent that the Constitution, at least in the abstract, limits Congress' power under the Commerce Clause, the logic and resulting standard adopted by the Seventh Circuit leaves those limits devoid of any substance. In sum, the appellate court's analysis devolves to a generalized police power -- a power that was eschewed by this Court in *Lopez* and which is fundamentally at war with the concept of a federal government of enumerated powers.

CONCLUSION

Accordingly, Petitioner respectfully submits that the Petition for Certiorari to the Court of Appeals for the Seventh Circuit should be granted.

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July 26, 1996

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES D. SODERNA, et al.,

Defendants-Appellants.

Nos. 95-1309, 95-1333, 95-1430, 95-1488, 95-1494

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 94 CR 86 -- J.P. Stadtmueller, Chief Judge.

ARGUED FEBRUARY 23, 1996 --
DECIDED APRIL 30, 1996

Before POSNER, Chief Judge, and FLAUM and KANNE, Circuit Judges.

POSNER, Chief Judge. The defendants appeal from their convictions for violating the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, raising a variety of constitutional questions. The Act, which already has survived similar constitutional challenges in three other circuits, *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995), was passed in the wake of continuing violence against, and other forcible

interference with, abortion clinics, their staffs, and their clientele by radical elements of the anti-abortion movement. Murder, arson, kidnappings, bombings and bomb threats, assaults, death threats, trespasses, vandalism, gas attacks, military-style assaults, and blockages of entrances to clinics--a concerted nationwide wave of violence, intimidation, and obstruction that had overwhelmed the local authorities in some areas and that local authorities in other areas were unwilling to take action against--impelled the passage of the Act with strong bipartisan support. *See, e.g.*, S.Rep. No. 177, 103d Cong., 1st Sess. (1993). Although as its title implies the Act is concerned primarily with the protection of abortion clinics, the drafters cast the net of liability wider. The Act forbids the use of force or threats of force or physical obstruction deliberately to injure, intimidate, or interfere with people seeking to obtain or to provide any reproductive medical or other health services, not just abortion, and also people seeking to exercise their religious right in a church or other house of worship. 18 U.S.C. § 248(a). Substantial criminal as well as civil penalties are authorized for violations of the Act; but where the violation " involv[es] exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense." § 248(b). The statutory term "physical obstruction" is defined as "rendering impassable ingress to or egress from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous." § 248(e)(4).

Early one morning in 1994, the six defendants in our case (one of whom has abandoned his appeal) blockaded the two entrances to an abortion clinic in Milwaukee. Four of the defendants blocked one entrance with a combination of a disabled automobile, a large drum filled with concrete and steel, and their bodies. The automobile was placed on the sidewalk directly in front of the recessed alcove of the entrance; the drum, two of the defendants, and a child occupied the alcove

itself. Two other defendants sat on the ground with their bodies extending upright into the car through holes cut in the car's floor, their bodies being attached to the car by handcuffs, welding, and other means. The doors of the car had been welded shut and the car was leaking gasoline. The remaining two defendants were similarly fastened to a station wagon that was blocking the other entrance to the clinic. It took the fire department several hours to take the cars apart, extricate the defendants from the cars without injuring the defendants, and clear the entrances. The defendants offered no resistance; there was no violence; there were no threats of violence, or even displays of anger, on the part of the defendants or their supporters, who were picketing in the vicinity. (All these things are apparent from the videotapes of the incident, which are a part of the record.) But during much of the period in which the fire department was working to clear the entrances, the members of the clinic's staff could not enter the clinic and patients with appointments to have abortions or other procedures or consultations could not be served.

The defendants, all of whom had been arrested for similar conduct in other states, were convicted after a bench trial (their demand for trial by jury having been refused) of physical obstruction of the staff and clientele of the clinic. As first offenders under the Freedom of Access to Clinic Entrances Act convicted only of nonviolent obstruction, the defendants received prison sentences ranging from 30 days to 6 months and fines ranging from $500 to $3,500.

The defendants argue that the Act exceed the Constitution's grant of authority to Congress to regulate interstate commerce. We rejected the argument in *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995). A number of abortion clinics draw both staff and patients from across state lines (the clinic doctor in this case lives in Illinois, though the clinic is in Wisconsin) and purchase many of their medical and other supplies in interstate commerce, S. Rep. No. 117, *supra,* at 31; and the anti-abortion movement, through tactics such as

those prohibited by the Act, has succeeded in curtailing the number and activities of abortion clinics. So this is a statute that really does seek to remove a significant obstruction, in rather a literal sense, to the free movement of persons and goods across state lines. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). The boycott of a single ophthalmological surgeon was held in *Summit Health, Ltd. v. Pinhas,* 500 U.S. 322, 329-30 (1991), to be within the power of Congress to prevent because of the impact on the market for ophthalmological services in Los Angeles. The Court emphasized that the test was not the effect of the particular conduct alleged, but that effect cumulated over all the conduct subject to the statute. *Id.* at 331-32; *see also Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 781 (7th Cir. 1994). The market in reproductive health services is as large nationwide as the Los Angeles market in ophthalmological services; is as much or more an interstate market because of interstate movement of patients, staff, and supplies; and is as likely to be disrupted by the kind of activity in which the defendant in this case engaged as the Los Angeles market in *ophthalmological* services was likely to be disrupted by the antirust violations with which the defendant hospital chain was charged.

The fact that the motive for the Freedom of Access to Clinic Entrances Act was not to increase the gross national product by removing a barrier to free trade, but rather to protect personal safety and property rights, is irrelevant. *Heart of Atlanta Motel, Inc. v. United States*, *supra*, 379 U.S. at 256-257. Congress can regulate interstate commerce for any lawful motive. *See, e.g. Champion v. Ames*, 188 U.S. 321, 356-63 (1903) (interstate transportation of lottery tickets); *Pic-A-State PA, Inc. v. Reno,* 76 F.3d 1294, 1300-03 (3d Cir. 1996) (same); *Hoke v. United States,* 227 U.S. 308 (1913) (interstate transportation of prostitutes); *Brooks v. United States*, 267 U.S. 432 (1925) (interstate transportation of stolen cars).

But the defendants also argue that the Act violates the First Amendment. They point out that they blockaded the clinic in order to express their opposition (the sincerity of which is is not in question) to abortion, that they did not injure or threaten to injure anybody, and that the First Amendment protects nonverbal as well as verbal expressive activity--protects, for example, the burning of the American Flag. *Texas v. Johnson,* 491 U.S. 397 (1989); *United States v. Eichman,* 496 U.S. 310 (1990). They do not question the right of government to prevent physical obstruction of access to buildings as well as to prevent violence. They argue rather that the singling out of abortion clinics for protection against violence and obstruction, and the fact that the Act punishes interference, intimidation, obstruction, and so forth only when it is done "*because* that person [the person interfered with, intimated, etc.] is or has been, or in order to intimate such person or any other person or any class of persons from, obtaining or providing" an abortion or some other service relating to pregnancy or the reproductive system, 18 U.S.C. § 248(a)(1) (emphasis added), show that the Act's real aim and likely effect are to deter the expression of a particular point of view, namely opposition to abortion. The fact that the protected class was broadened during the passage of the bill through Congress to include all medical and health services related to reproduction (not just abortion), plus places of worship, is, in the defendants' view, a transparent and ignoble figleaf. The statute is, they claim, "obviously" aimed at the anti-abortion movement.

It is not at all clear that the statute is "aimed" at the anti-abortion movement. We should not lightly impugn the motives of legislators. Some staunch opponents of abortion, such as Senator Danforth, were eloquent in support of the bill. *See* 139 Cong. Rec. §15680 (daily ed. Nov. 16, 1993). It is possible to oppose abortion yet also oppose (and consider counterproductive) not only the murder of abortion doctors but also the blockading of entrances to abortion clinics by

tactics described by Judge Coffee, dissenting in the factually identical case of *United States v. Wilson*, *supra*, as "distasteful or worse." 73 F.3d at 689. With matters of taste we have nothing to do. If taste were a criterion of protected speech, public debate in the United States would be stilled. The Freedom of Access to Clinic Entrances Act is not about bad taste in the marketplace of ideas and opinions. It is about, in Judge Coffey's words, what is "worse" than merely "distasteful"; it is about conduct that, rather than being purely symbolic, like flag-burning, *Texas v. Johnson*, *supra*, or wearing a black armband, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), has like political assassination, cf. Laurence H. Tribe, American Constitutional law 828 n.18 (2d ed. 1988), physical consequences that are independent of symbolic significance.

"[S]ome forms of expressions," we wrote in a case involving "cross burning used to intimidate," "are harmful and damaging to others and, as such, do not enjoy the protecting cover of speech in the constitutional sense." *United States v. Hayward*, 6 F.3d 1241, 1250 (7th Cir. 1993). The behavior of the defendants in the present case dramatized their opposition to abortion; it was expressive. But it also made it physically impossible (or at least unreasonably difficult) for staff and patients to enter the clinic. To persuade and to blockade are importantly different forms of action, though both are expressive. One operates just on the mind, the other on the body as well. Burning a flag that one has bought and paid for does not prevent anybody from doing anything; it does not interfere with anyone's personal liberty or property rights. Blockading the entrance to a building not your own does both, just as killing a political opponent invades a right of personal liberty at the same time that it makes a political statement, as in the case of John Wilkes Booth's killing of Abraham Lincoln. The distinction is engraved in the case law interpreting the First Amendment. "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First

Amendment. . . . '[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.' " *Wisconsin v. Mitchell,* 508 U.S. 476, 484-85 (1993), quoting *Robert V. United States Jaycees*, 468 U.S. 609, 628 (1984).

The First Amendment forbids the states to outlaw peaceful nontrespassory picketing, which like flag-burning does not deprive the people whom the picketers are quarreling with, or trying to influence, of their personal liberty or property rights. *Thornhill v. Alabama*, 310 U.S. 88, 98-101 (1940). But the amendment does not extend its protection to the next step, where the picketer physically impedes entry to the picketed premises. *E.g., Cameron v. Johnson,* 390 U.S. 611, 616-17 (1968); *Cox v. Louisiana*, 379 U.S. 536, 553-55 (1965). "A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Id.* at 555. "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, *and the property* of its residents cannot be doubted." *Thornhill v. Alabama, supra,* 310 U.S. at 105 (emphasis added). "We thus need not tolerate coercive or obstructionist conduct solely because it serves some passionate ideology or interest." *Pro-Choice Network v. Schenk*, 67 F.3d 377, 395 (2d Cir. 1995) (*en banc*) (concurring opinion joined by majority of the judges), *cert. granted* __U.S. __, 116 S.Ct. 1260 (1996). When "specific individuals are targeted at locations difficult or inconvenient for them to avoid, the First Amendment's tolerance of plausibly coercive or obstructionist protest is least." *Id.* At 398. Here the defendants went beyond protest and invaded property rights.

The difference between communication and obstruction was well expressed by one of the defendants in this case when he told the judge, "What we did, we weren't there to protest abortion. If I wanted to protest abortion, I would write my

Senator or Congressman. We were there to save innocent human life." The Freedom of Access to Clinic Entrances Act does not close the channels of protest to the right to life movement.

If the government distinguishes arbitrarily among classes of expressive conduct, it may be found (we do not say "will," because we do not have to decide the issue) to be interfering impermissibly with the marketplace in ideas and opinions. If, for example, the Freedom of Access to Clinic Entrances Act made it a felony to assault the employee of an abortion clinic but only a misdemeanor to assault the employee of a pregnancy clinic that urges its clientele to carry the fetus to term and put up the baby for adoption rather than to have an abortion, it could be argued that the Act violated the First Amendment. Whether the argument would succeed is uncertain in light of cases such as *Wisconsin v. Mitchell*, *supra*, 508 U.S. at 485-89; *United States v. O'Brien*, 391 U.S. 367,88 (1968), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In the last of these cases, the Court said that "where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory [or otherwise disfavored] idea or philosophy." *Id.* At 390. The "ordinance struck down in *R.A.V.* was explicitly directed at expression [namely hate speech] . . . [whereas] the statute in this case is aimed at conduct unprotected by the First Amendment." *Wisconsin v. Mitchell, supra,* 508 U.S. at 487-89. Those words could have been spoken of the present case.

If, in our hypothetical case of differential punishment for assaults against employees of abortion clinics versus clinics that promote adoption as an alternative to abortion, the basis for the difference was that there was more violence against employees of pregnancy clinics, the difference might be lawful. But this we need not decide. For by broadening, out of an abundance of caution, the protected activity from abortion to reproductive health services, the drafters finessed this par-

ticular type of challenge. It is true that the Act is being *enforced* mainly against opponents of abortion. But this is because it is mainly they who are interfering with the provision of pregnancy-related services, just as it was Vietnam War protesters who burned their draft cards. *United States v. O'Brien, supra.* Selective prosecution on invidious grounds, *see, e.g., Wayte v. United States,* 470 U.S. 598 (1985); *United States v. Kerley,* 787 F.2d 1147 (7th Cir. 1986), is not alleged. A group cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group. *Madsen v. Women's Health Center, Inc.,* __U.S.__, __-__, 114 S. Ct. 2516, 2523-24 (1994).

By the same token, the authority of government to criminalize dangerous or destructive conduct is not diminished by the fact that most or even all of the people who engage in the particular conduct sought to be criminalized do so for political reasons. *Id.* At 2523. Suppose that the only people in the United States who bombed laboratories in which animal research is conducted were members of the Anti-Vivisection League, which had decided that bombing these laboratories is the only effective way of spreading its message. Would the fact that violence was the only effective means of conveying the Leagues' message preclude Congress from passing a law against the bombing of laboratories by persons seeking to impede research on animals? We think not, even though the law would interfere with the marketplace in ideas and opinions by diminishing, even extinguishing (on our hypothetical assumptions), the League's voice.

The vast majority of the millions of Americans who oppose abortion and would like to see restored the state laws struck down in *Roe v. Wade* and the cases following it do not utilize violence or blockades or other illegal tactics disrespectful of personal liberty and property rights to disseminate their message. The Freedom of Access to Clinic Entrances Act will therefore not have the silencing effect on the anti-abortion movement that our hypothetical bombing law would

have on the hypothetical Anti-Vivisection League, a silencing effect that nonetheless would not, as we have said, invalidate such a law. Indeed, since many adherents of the right to life movement believe that the movement is harmed rather than helped by violent or confrontational tactics, the Act may assist rather than impede the movement's efforts to persuade those open to persuasion on the issue.

Unless--to come to the second half of the defendants' First Amendment challenge--the Act is so vague that it will deter entirely peaceable protest against abortion. The defendants focus on the statutory definition of "physical obstruction" as including "rendering passage to or from [an abortion clinic or other facility] unreasonably difficult or hazardous." They express concern that someone who was occupying merely a part of the sidewalk leading to an abortion clinic, or even someone trying to hand an anti-abortion leaflet to people going to and coming from the clinic, might be thought to be making passage "unreasonably difficult." But when pressed at argument for suggestions as to how to make the statute clearer, the defendants' counsel could come up with nothing better than (1) eliminating the criminal remedies, (2) limiting the statute to obstructions "in front of clinic entrances," or (3) forbidding obstruction "within 100 yards" of the entrance. The first suggestion assumes, what we do not believe, that the statute cannot be made precise enough to permit the imposition of criminal punishments for its violation. The second suggestion is a vague as the current statute. The third is underinclusive, since depending on the design and location of a clinic a total blockage might be possible at a distance greater than 100 yards.

There are limits to the precision of language. Confined to forbidding the *complete* blockage of clinic entrance (and thus dispensing with the "unreasonably difficult" language, the source of the alleged vagueness), the Act would be easily evaded, for example by blockaders' leaving just enough space between two of them for a person to squeeze through, touch-

ing the blockaders on either side (thus committing a technical battery upon them, though probably a privileged one); or by lying down across the entrance so that the entrant has to step--or jump?--over the blockader. And what of cases in which only one entrance of several (but that the main one) is blocked, or in which all entrances are blocked but persons could easily enter through windows on the ground floor, or in which the roof is strong enough to land a helicopter on? It is difficult to imagine a form of words more perspicuous than "unreasonably difficult" to encompass these and the myriad of other possibilities that come to mind. If as we believe the government is allowed to prohibit the obstruction of access to abortion clinics, it must be allowed to define "obstruction" with sufficient breadth to make the prohibition effective, even if the unavoidable fuzziness of the definition creates a theoretical possibility of deterring lawful expressive activity. The Supreme Court has less doubt than we that "unreasonably obstruct" is clear enough to pass constitutional muster, having marked in *Cameron v. Johnson*, *supra*, 390 U.S. at 616, that the word "unreasonably" "is a widely used and well understood word and clearly so when juxtaposed with 'obstruct' and 'interfere.'

The last and most substantial issue raised by the defendants concerns the right of trial by jury, secured by both Article III section 2 of the original Constitution and the Sixth Amendment, in all federal criminal prosecutions. We state the issue as one of constitutional law rather than of statutory interpretation because we have been pointed to nothing in the text or history of the Freedom of Access To Clinic Entrances Act that suggests that the drafters intended defendants to have a right to a jury trail and because the defendants do not argue that the right can be derived by statutory as distinct from constitutional interpretation.

Despite the uncompromising language of the Constitution, the Supreme Court has held, consistent with eighteenth-century practice, that the constitutional right to a jury trial in

federal criminal cases does not cover prosecutions for petty offenses, *E.g., Callan v. Wilson*, 127 U.S. 540, 552-53. (1888); *Muniz V. Hoffman*, 422 U.S. 454, 475-76 (1975). Besides the historical argument for this exception, the social interest in effective law enforcement has been deemed to outweigh the citizen's interest in interposing a jury of lay persons between the state and himself when the penalty that he faces is mild. The burden of providing jury trials for all petty offenses has been thought disproportionate to the citizen's need for the additional protection against the power of the state that a jury would give him. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

As an original matter we might question whether an offense punishable by up to six months in prison plus a $10,000 fine is properly described as "petty," at least in the absence of historical evidence, not cited to us, that comparable punishments were routinely administered in the eighteenth century without a jury. But we do not write on a clean slate. The Supreme court, troubled by the difficulty of reasoning one's way by the methods used by courts to the line between petty and serious, has made clear in a brace of recent unanimous opinions that where the maximum prison terms is six months there is almost never going to be constitutional right to trial by jury even if fines or other supplementary sanctions increase the net severity of punishment well beyond that of the prison term standing by itself. *Blanton v. City of North Las Vegas, supra*, involved a state statute that punished driving under the influence of alcohol. The statute authorized a maximum punishment for first offenders of six months' imprisonment plus a fine of $1,000 plus loss of driving privileges for 90 days plus mandatory attendance at an alcohol abuse center at the defendant's expense. The Court held that this statute created a petty offense within the meaning of the Constitution. The Court said that "primary emphasis . . . must be placed on the maximum period of incarceration. Penalties such as probation or a fine . . . cannot approximate in severity the loss of liberty

that a prison term entails. Indeed, because incarceration is an 'intrinsically different' form of punishment, . . . it is the most powerful indicator whether an offense is 'serious.' " *Id.* at 542 (citation omitted). A statute that imposes a maximum sentence of imprisonment of six months is presumed to create a petty offense, and additional statutory penalties will carry the statute over the line only if, in combination with the maximum prison term, they "are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* at 543.

If careful attention is paid to the word "clearly" in the last passage that we quoted, it is apparent that even though the maximum fine is higher in the present case than it was in *Blanton* it is not so much higher as to make *clear* that Congress considered a first-time blockade of an abortion clinic a serious offense. When inflation since *Blanton* was decided (modest though it has been) is taken into account along with the absence of any counterpart here to the suspension of a driver's license, it is unclear whether the maximum criminal penalties for the relevant offense in this case (nonviolent obstruction by a first offender) are significantly more severe than those in *Blanton*.

The Supreme Court's next and latest expression of views on the meaning of "petty offense" for purposes of the constitutional right to trial by jury in criminal cases came in *United States v. Nachtigal*, 507 U.S. 1, 113 (1993) (*per curiam*). A federal regulation punished driving in a national park under the influence of alcohol with a maximum term of imprisonment of six months and a maximum fine of $5,000, five times the maximum fine in *Blanton*. Nevertheless the Supreme Court said that the case was "quite obviously controlled" by *Blanton*. 507 U.S. at 2-4. The Court attached no significance to the higher fine, merely remarking that "this monetary penalty 'cannot approximate in severity the loss of liberty that a prison term entails.' " *Id.* at 4 (quoting *Blanton*, 489 U.S. at 542). It is noteworthy that the regulation authorized, as an

alternative to imprisonment, a term of probation of five years. This was probation with a bite, or rather a mouthful of bites. The judge was authorized to impose 21 conditions on a convicted defendant sentenced to probation, including requiring him to live in a community correctional facility for the entire term. All this is set forth in the Court's opinion, 507 U.S. at 4 and n.*, but did not move the Court to reclassify the offense from petty to serious. Yet being required to live in a correctional facility for five years plus having to pay a fine of $5,000--a combination of sanctions expressly authorized by the regulation upheld in *Nachtigal*--is a more severe punishment than imprisonment for six months plus a fine of $10,000. So confident was the Court that the punishment authorized by the statute involved in *Nachtigal* did not cross the line from petty to serious that it reversed the court of appeals unanimously on the certiorari papers, without calling for briefs or hearing oral argument.

The defendants point out that Congress has defined the term "petty offense," as used in Title 18 of the United States Code, to mean, so far as might bear on this case, an offense for which the maximum fine in the case of an individual defendant, does not exceed $5,000. 18 U.S.C. § 19; *see id.*, § 3751 (b)(6). The Supreme Court held in *Muniz v. Hoffman, supra*, 422 U.S. at 477, however, that the statutory definition does not determine whether an offense is petty in the constitutional sense. The fine in that case, held not to entitle the defendant to a jury trial, exceeded the then maximum fine for a Title 18 "petty offense" by a factor of twenty--$10,000, as here, but worth a lot more twenty years ago, versus $500. What is more, 18 U.S.C. § 19 allows a petty offender to be fined $10,000 if the offender is an organization rather than an individual. 18 U.S.C. § 19; *see id.*, § 3571 (c)(6). It is hard to believe that the difference in resources between individuals and organizations has constitutional significance, when we reflect that many individuals have more money than many organizations.

We do not want to be understood as holding that criminal punishments other than formal incarceration can never move an offense from the petty to the serious category. If the fine for a first-time nonviolent obstruction of a clinic or other facility covered by the Freedom of Access to Clinic Entrances Act were $1 million, it would be hard to resist the inference that the offense was serious rather than petty. We need not decide in this case where between $5,000 and $1 million the line should be drawn. It is enough that, in light of the reasoning of *Blanton* and *Nachtigal*, it cannot be drawn at $10,000. If we have misunderstood those decisions, the Supreme Court knows how to straighten us out.

The defendants remind us that the Freedom of Access to Clinic Entrances Act creates civil as well as criminal remedies. 18 U.S.C. § 248(c). The civil remedies are not, however, a part of the criminal punishment. They are imposed in proceedings separate from any criminal proceedings brought against the defendant and they are available whether or not the defendant is prosecuted for a criminal violation. They might as well be in a different statute. And insofar as damages or other traditionally "legal" (as distinct from equitable) remedies are sought in a proceeding under the Act, the defendants are entitled by the Seventh Amendment to trial by jury. A misdemeanor prosecution for a traffic offense, which no one would suppose entitled the defendant to a jury, might be the prelude to a wrongful-death suit against him seeking millions of dollars in compensatory and punitive damages. Yet the prospect of such a sequel would not entitle him to a jury in his traffic case.

The other grounds of appeal--that the Freedom of Access to Clinic Entrances Act violates the equal protection clause of the fourteenth Amendment and that defendant Hatch was not in fact blocking an entrance (a videotape shows she was)--are plainly without merit.

We can summarize briefly. The defendants violated a statute that is within the grant of legislative power to Congress in the commerce clause in Article I of the Constitution. And because it regulates with adequate clarity and precision injurious conduct that is not purely symbolic, the statute does not infringe the First Amendment. The defendants were not entitled to have a jury consider the charges against them, because their offense was "petty" in the sense that the Supreme Court has given the word and was therefore beyond the scope of the constitutional guaranty of trial by jury for federal crimes. Whether the statute was a necessary or a wise exertion of the federal police power, whether it will harm or help the opponents of abortion, and whether Congress should have entitled all persons prosecuted under it to trial by jury are not issues that have been confided to the judiciary for resolution. And, needless to say, we are authorized to reconsider the right of abortion that is the target of these defendants.

AFFIRMED.

KANNE, Circuit Judge, concurring in part and dissenting in part. Today, this court decides that the Freedom of Access to Clinic Entrances Act does not violate the First Amendment--a decision with which I concur. The majority continues on, however, to hold that a first violation of the Act involving exclusively nonviolent physical obstruction--which under 18 U.S.C. § 248(b) is punishable by up to both six months in prison and a $10,000 fine--is a "petty" crime, meaning that the defendants charged with such a violation have no constitutional right to a trial by jury. Because I believe that this holding misconstrues relevant Supreme Court precedent and disregards objective evidence of Congress's express intent, from it I must respectfully dissent.

I

It has long been well established in Supreme Court case law that the constitutional right to a trial by jury does not extend to petty offenses. *See Callan v. Wilson*, 127 U.S. 540, 557, 8 S. Ct. 1301, 1307 (1888); *Natal v. Louisiana*, 139 U.S. 621, 624, 11 S. Ct. 636, 637 (1891). According to the Court, what offenses are petty should be determined "not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of community taken as a gauge of its social and ethical judgments." *District of Columbia v. Clawans*, 300 U.S. 617, 628, 57 S. Ct. 660, 663 (1937).

To this end, the Supreme Court has consistently looked to the state and federal legislatures for guidance as to which crimes should be considered petty and which should be considered serious. The Court instructs that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the tasks, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.' " *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42, 109 S. Ct. 1289, 1292 (1989) (quoting *Landry v. Hoepfner*, 840 F.2d 1202, 1209 (5th Cir. 1988) (en banc)).

Uncovering the enacting legislature's judgment of a crime's seriousness entails a two-step interpretive process. First, the Court looks to the crime's statutorily prescribed maximum authorized penalty because, in enacting the maximum penalty, "the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense."[1] *Frank v. United States*, 395 U.S. 147,

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[1] Note that "when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty" (such as for criminal contempt), the Court "look[s] to the penalty actually imposed as

149, 89 S. Ct. 1503, 1505 (1969) (citing *Duncan v. Louisiana*, 391 U.S. 145, 162 N.35, 88 S. Ct. 1444, 1454 n. 35 (1968)). Second, the Court examines whether that particular maximum penalty indicates a legislative determination of pettiness or one of seriousness. "In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial," the Court compares the penalty against "objective criteria, chiefly the existing laws and practices in the Nation." *Duncan*, 391 U.S. at 161, 88 S. Ct at 1453. Thus, in case after case the Supreme Court has determined the seriousness of an offense by considering its maximum authorized penalty in light of Congress's statutory definition of "petty offense" in 18 U.S.C. § 19 (and its predecessor, 18 U.S.C. § 1), *see Cheff v. Schnackenberg*, 384 U.S. 373, 379-80, 86 S. Ct. 1523, 1526 (1966); *Duncan*, 391 U.S. at 161-62, 88 S. Ct. at 1453-54, *Frank*, 395 U.S. at 150-52, 89 S. Ct. at 1506-07; *Baldwin v. New York*, 399 U.S. 66, 70-71, 90 S. Ct. 1886, 1889 (1970); *Blanton*, 489 U.S. at 544-45, 109 S. Ct. at 1294, as well as in light of the prevailing practice among the fifty states concerning what penalties may be imposed absent a jury trial, *see Duncan*, 391 U.S. at 161 & n.33, 88 S. Ct. at 1454 & n. 33; *Baldwin*, 3899 U.S. at 71-72 & N.18 90 S. Ct. at 1889-90 & n.18; *Blanton*, 489 U.S. at 544-45, 109 S. Ct. at 1294.

Congress's statutory definition of "petty offense" in 18 U.S.C. § 19 includes all crimes punishable by no more than six months in prison, by a fine not greater than $5,000 for an individual or $10,000 for an organization, or both.[2] Many

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the best evidence of the seriousness of the offense." *Bloom v. Illinois*, 391 U.S. 194, 211, 88 S. Ct 1477, 1487 (1968).

[2] Until 1984, Congress defined "petty offense" in 18 U.S.C. § 1 as "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . . ." Today, 18 U.S.C. § 19 defends "petty offense" as "a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section

states have conformed their practices of granting jury trials in criminal cases to the federal benchmark, while some have enacted more generous standards, including extending the right to trial by jury to all crimes where any term of imprisonment may be imposed.[3]

3571(b) (6)or (7) in the case of an individual or section 3571 (c) (6) or (7) in the case of an organization." Read together with 18 U.S.C. §§ 3559 (a) (7)-(9), 3571 (b) (6)-(7), (c)(6)-(7), this definition translates into any offense for which the maximum penalty does not exceed six months in prison, a fine of $5,000 for an individual or $10,000 for an organization, or both. In lieu of incarceration, a petty offender may be sentenced to up to a five-year period of probation, which may be subject to a number of discretionary conditions, and which if violated may result in full resentencing. 18 U.S.C. §§ 3551, 3561-66.

[3] In *Baldwin*, the Supreme court referenced information concerning the prevailing jury trial practice among the states by citing to a survey in the American Bar Ass'n Project on Standards for Criminal Justice, Advisory Committee on the Criminal Trial, Trial by Jury 20-23 (Approved Draft 1968). 399 U.S. at 72 n.18, 90 S. Ct. at 1890 n18. The project's report concluded that most state practices were in keeping with the then-federal standard, 18 U.S.C. § 1, and recommended that the standard "should be the upper limit upon the definition of 'petty offense.' " *Id.*

Today, the ABA advocates a much more lenient standard: "Jury trial should be available to a party, including the state, in criminal prosecutions in which confinement in jail or prison may be imposed." *ABA Standards for Criminal Justice Discovery and Trial by Jury,* Standard 15-1.1 (Right to jury trial), at 121 (3d ed. 1996). The commentary to this standard notes:

> The states vary in providing a state right to jury trail in criminal cases, whether the right is constitutional or statutory. Many states follow the federal rule by refusing trial by jury to a defendant charged with those minor crimes defined in the state as 'petty offense' or 'infractions'. Other states, following the earlier lead of the ABA standards, provide for trial by jury in all cases where there is potential imprisonment. Some states have constitutional provisions for nonjury trials of petty offenses in the first instance, with right to *de novo* jury trial on appeal.

By comparison to these legislative pronouncements, the Supreme Court has held that a crime punishable by more than six months in prison is always serious for purposes of the constitutional right to a jury trial. *Baldwin*, 399 U.S. at 71-74, 90 S. Ct. at 1889-91. "We cannot . . . conclude that . . . administrative conveniences, in light of the practices that now exist in every one of the fifty States as well as in the federal courts, can . . . justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment." *Id.* at 73-74, 90 S. Ct. at 1890-91.

On the other hand, the question of at what point a penalty other than imprisonment (such as a fine or term of probation) rises to the level of seriousness necessary to implicate the right to a jury trial remains unanswered. The Supreme Court has indicated that, despite a maximum potential imprisonment of no more than six months, such other penalties could render a crime serious enough to warrant a jury trial. *See Blanton,* 489 U.S. at 543, 109 S. Ct. at 1293. But because the Court has never been confronted with a case where it has considered the crime's other potential penalties to be sufficiently serious, the line has never been drawn. Nevertheless, we are given some guidance because, as discussed below, the four cases whether the Supreme Court has addressed the seriousness of penalties other than imprisonment have--like the cases considering terms of imprisonment--looked to the judgments expressed by the state and federal legislatures concerning what is serious and what is petty.

Id. at 123 (footnotes omitted). It is also worth noting that even in those states that follow the federal rule, many statutorily define "petty offenses" or "infractions" more restrictively than has Congress. *See, e.g.*, CAL PENAL CODE §§ 19.6, 19.8 (no jury trial for "infraction," which is defined as an offense for which there can be no imprisonment and for which the maximum fine does not exceed $250); COLO REV. STAT. § 16-10-109(1)-(2) (defining "petty offense," for which there is no jury trial unless the defendant pays a jury fee, as any crime for which the penalty does not exceed six months in prison, a $500 fine, or both).

In *Frank v. United States*, the defendant had been convicted of criminal contempt in federal court and sentenced to a three-year term of probation. 395 U.S. at 148, 89 S. Ct. at 1504-05. The Court first noted that prior decisions had relied upon Congress's definition of "petty offense" in 18 U.S.C. § 1. *Id.* at 150 n.3, 89 S. Ct. at 1506 n.3. It then observed that in enacting the probation statute, Congress had made the possibility of probation applicable to "any offense not punishable by death or life imprisonment," i.e., to both petty and serious offenses alike.[4] *Id.* at 150, 89 S.Ct. at 1506. "Therefore," the Court reasoned, "the maximum penalty authorized in petty offense cases is not simply six months' imprisonment and a $500 fine. A petty offender may be placed on probation for up to five years . . . ." *Id.* at 150-51, 89 S. Ct. at 1506. The Court thus concluded: "Petitioner's sentence is within the limit's of the congressional definition of petty offenses. Accordingly, it was not error to deny him a jury trial." *Id.* at 152, 89 S. Ct. at 1507.

In *Muniz v. Hoffman*, the defendant, a union organization, had been convicted of criminal contempt and sentenced to pay a $10,000 fine. 422 U.S. 454, 457, 95 S. Ct. 2178, 2181 (1975). At the time *Muniz* was decided, Congress's "petty offense" definition in 18 U.S.C. § 1 placed the upper limit for fines at $500; however, the definition did not (as 18 U.S.C. § 19 does today) specifically address what fine level would be considered serious for an *organization* as opposed to an individual. The union argued that because the fine imposed was greater than $500, it was automatically entitled to a trial by jury. The Court disagreed and refused to blindly apply the congressional definition to all circumstances because it did not believe that the definition could plausibly be read to suggest Congress's judgment that a fine over $500 will al-

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[4] At the time *Frank* was decided, probation was governed by 18 U.S.C. §§ 3651-55. These statutes were subsequently repealed, and probation is today addressed at 18 U.S.C. §§ 3561-66.

ways be serious, even when imposed upon a large organization. *Id.* at 477, 95 S. Ct. at 2191. The Court explained that "[i]t is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union." *Id.* In conclusion, the Court further considered the relative financial impact of the fine on the union: "This union . . . collects dues from some 13,000 persons; and although the fine is not insubstantial, it is not of such magnitude that the union was deprived of whatever right to jury trial it might have under the Sixth Amendment." *Id.*

Thus the Supreme Court refused to rely upon 18 U.S.C. § 1 in *Muniz* only because it did not believe that the definition represented a legislative judgment of seriousness with respect to a fine levied on a large organization. Accordingly, our sister circuits have interpreted the *Muniz* holding as limited exclusively to fines imposed upon organizations, and therefore they have consistently relied upon the congressional definition of "petty offense" when considering the seriousness of fines levied on individual defendants.[5] The majority, unlike these other circuits, expresses incredulity that the difference be-

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[5] *See Douglas v. First National Realty Corp.* 543 F.2d 894, 902 (D.C. Cir. 1976); *United States v. Professional Air Traffic Controllers Org.*, 678 F.2d 1, 4-5 (1st Cir. 1982); *United States v. Troxler Hosiery Co., Inc.*, 681 F.2d 934, 936 n.2 (4th Cir. 1982); *Girard v. Goins,* 575 F.2d 160, 164-65 (8th Cir. 1978); *United States v. Hamdan*, 552 F.2d 276, 278-80 (9th Cir. 1977); *United States v. McAlister*, 630 F.2d 772, 774 (10th Cir. 1980). The Fifth Circuit initially interpreted *Muniz* as a statement by the Supreme Court that only imprisonment and not a fine was important in determining whether a crime was serious or petty, *see Landry v. Hoepfner,* 840 F.2d 1201, 1216 n.30 (5th Cir. 1988); however, since the Supreme Court decided *Blanton,* the Fifth Circuit has indicated that it would look to the congressional definition of "petty offense" in determining whether a heavy fine evidenced a legislative determination of seriousness. *See United States v. Time,* 21 F.3d 635, 642 (5th Cir. 1994).

tween an individual and an organization could be constitutionally relevant. *Supra*, at 14. However, Congress expressed its judgment that what fine level indicates seriousness for purposes of the right to a jury trial differs between individuals and organizations when, in amending the definition of "petty offense" in 1984, it enacted a much higher maximum fine for organizations than for individuals (interestingly enough, $10,000, the amount the Supreme Court considered petty when levied against an organization in *Muniz*). *See* Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, § 8, 98 Stat. 3134, 3138. From the legislative history of this enactment, it is apparent that the rationales of Congress for the differing fine levels between individuals and organizations were twofold. First, Congress indicated its belief that organizations *generally* have greater resources than individuals. H.R. REP. NO. 98-906, 98th Cong., 2d Sess. 15-16, 19 (1984), *reprinted at* 1984 U.S.C.C.A.N. 5433, 5447-48, 5452. Secondly, and most importantly, Congress explained that because an organization cannot be imprisoned in addition to paying a fine as an individual can, a higher fine must be levied against an organization in order to attain the same level of severity presented by a combination of imprisonment and a lower fine imposed upon an individual. *Id.*

In *Blanton v. City of Las Vegas,* the Supreme Court considered the seriousness of a Nevada drunk driving law, under which a defendant faced a possibility of up to six months in prison (or alternatively, forty-eight hours of community service wearing clothing identifying him as a DUI offender), a fine of up to $1000, loss of his driver's license for ninety days, and a requirement to attend an alcohol abuse education course at his own expense. 489 U.S. at 539-40, 109 S. Ct. at 1291. The Court held that where an offense is punishable by no more than six months in prison, it is presumed to be petty. *Id.* at 543, 109 S. Ct. at 1293. However, a defendant may rebut this presumption "if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum

authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.*

The majority invokes the *Blanton* Court's language (and particularly, the word "clearly") to support its proposition that a fine will virtually never be serious enough to implicate the right to a jury trial. *Supra,* at 12-13. However, the majority pays no heed to the method by which the unanimous *Blanton* Court went on to determine whether the Nevada law's $1,000 fine clearly reflected a legislative determination of seriousness. In keeping with its long line of precedent, the Court compared the $1,000 fine against objective criteria--the laws and practices in the Nation-reasoning that "[a]s for the possible $1,000 fine, it is well below the $5,000 level set by Congress in its most recent definition of a 'petty' offense . . . and petitioners do not suggest that this congressional figure is out of step with state practice for offenses carrying prison sentences of six months or less." *Id.* at 544-45, 109 S. Ct. at 1294. As the Court noted, "[w]e have frequently looked to the federal classification scheme in determining when a jury trial must be provided," and "we [have] looked to state practice in our past decisions, . . . chiefly to determine whether there was a nationwide consensus on the potential term of imprisonment or amount of fine that triggered a jury trial . . . ." *Id.* at 545 n. 11, 109 S. Ct. 1294 n. 11. Thus, *Blanton* reiterates that we are to look to the congressional definition of "petty offense," as well as to the prevailing practice of the state legislatures concerning what penalties correlate with seriousness, in evaluating whether a particular fine clearly evinces a legislative determination of seriousness.

Lastly, in *United States v. Nachtigal,* the Court addressed the seriousness of 36 C.F.R. §§ 4.23(a)(1) - (2) (1992), a federal regulation that prohibited operation of a motor vehicle in a national park while under the influence of alcohol. 507 U.S. 1, 2, 113 S. Ct. 1072, 1072 (1993). The offense was designated as a class B misdemeanor under the federal classifica-

tion system and, therefore, was subject to a maximum authorized penalty of up to both six months in prison and a $5,000 fine. *Id.* (citing 18 U.S.C. §§ 3581(b)(7), 3571(b)(6), (e)). As an alternative to imprisonment, a sentencing court might instead impose a term of probation not to exceed five years, which could be subject to any number of discretionary conditions. *Id.* (citing 18 U.S.C. §§ 3561(a)(3), (c) (2), 3563(b)). The Supreme Court held, in a short *per curiam* opinion, that this offense was petty for purposes of the right to a jury trial. *Id.* at 4, 113 S. Ct. at 1074.

However, *Nachtigal* was only, as described by the Court, "a relatively routine application of the rule announced in *Blanton*." *Id.* Although the short *Nachtigal* opinion never expressly refers to the congressional definition of a "petty offense," its holding represents merely a straightforward application of the analysis in *Blanton*. In determining whether a $1,000 fine clearly evidenced a legislative determination of seriousness, the *Blanton* Court looked to the congressional definition of a petty offense, which includes "a Class B misdemeanor, a Class C misdemeanor, or an infraction" with a fine no greater than $5,000. 18 U.S.C. § 19. The offense in *Nachtigal* was in fact a class B misdemeanor, and therefore its various penalties (prison or probation, and a $5,000 fine) fell squarely within Congress's judgment of what is petty. Thus, it is clear that the penalties attached to the offense in *Nachtigal* did not manifest a legislative judgment of seriousness. The Court was able to render an opinion without briefs or oral argument because *Nachtigal* was, under the reasoning of *Blanton*, an easy case.

The majority attempts to make more of *Nachtigal* than it is. First, the majority notes how the *Nachtigal* Court "attached no significance" to the $5,000 fine, even though it was five times the $1,000 maximum fine in *Blanton*. *Supra*, at 13. The majority interprets such nonchalance as an indication that a $5,000 fine is not even close to being serious. However, as explained above, there is no incongruity between

the fact that *Nachtigal* was a "relatively routine application of the rule announced in *Blanton*" and the fact that the case before us is not. The penalties for the crime we consider today, unlike those in *Nachtigal,* fall without the congressional definition of a "petty offense." And the mere fact that a $5,000 fine, which is much greater than a $1,000 fine, is considered petty does not necessitate the conclusion that a $10,000 fine, which is much greater than a $5,000 fine, be similarly treated —especially when Congress has clearly expressed its judgment that a $5,000 fine is petty and a $10,000 fine is not. One might question whether a $10,000 fine is substantially greater than a $5,000 one, but the Supreme Court has explained that drawing the line between petty and serious "cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan*, 391 U.S. at 161, 88 S. Ct. at 1453. This is precisely why the Supreme Court has instructed us to look to the legislatures for guidance in drawing it.

Secondly, the majority points to admittedly strong language in *Nachtigal* that a fine "cannot approximate in severity the loss of liberty that a prison term entails." *Supra,* at 13 (quoting *Nachtigal*, 507 U.S. at 4, 113 S. Ct. at 1074). At first blush, this language seems to imply that a fine could never be serious enough to tip the scale from petty to serious. However, this language is a direct quote from *Blanton*, and the Court in *Blanton* did not intend to hold that a heavy fine could not be serious enough to implicate the right to a jury trial. 489 U.S. at 542-43, 109 S. Ct. at 1292-93. Rather, the *Blanton* Court indicated that a fine could in fact evidence a legislative determination of seriousness, and it looked to the congressional definition of "petty offense" in determining whether the $1,000 fine at issue did so. *Id.* at 544-45, 109 S. Ct. at 1294. The fact that the average defendant's willingness to pay to stay out of prison is extremely high does not mean that a heavy fine can never denote a serious offense. The majority itself admits that a fine could potentially be of such

severity as to require a jury trial (postulating $1 million), but it refuses to draw a line. *Supra,* at 14. The Supreme Court has instructed, however, that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature," and Congress has already indicated its judgment as to where the line should be drawn by enacting 18 U.S.C. § 19.

Thirdly, the majority makes much of the penalties that were considered petty in *Nachtigal,* maintaining that because those penalties were more serious than the ones we address today, we must find a nonviolent first violation of the Freedom of Access to Clinic Entrances Act to be petty. *Supra,* at 13-14. The majority focuses on the fact that as a substitute for imprisonment the defendant could have been sentenced to five years probation, which at the sentencing court's discretion might be subject to one or more of several conditions set out at 18 U.S.C. § 3563(b), including having to spend the five-year probation period residing at a halfway house. The majority reasons that "being required to live in a [community] correctional facility for five years plus having to pay a fine of $5,000--a combination of sanctions expressly authorized by the regulation upheld in *Nachtigal*--is a more severe punishment than imprisonment for six months plus a fine of $10,000." *Supra,* at 14. However, this comparison is faulty; it rests upon the assumption that five years' probation (even in a halfway house) is a more severe penalty than six months in prison--an assumption that was completely rejected by the Court in *Nachtigal,* 507 U.S. at 4 113 S. Ct. at 1074. According to the Supreme Court, five years' probation and a $5,000 fine (found petty in *Nachtigal*) is a lesser penalty than six months in prison and a $5,000 fine (also found petty in *Nachtigal*). *Id.* Six months in prison and a $10,000 fine (the maximum authorized penalty we address today) is therefore a *greater* penalty than any of the possible penalty combinations found petty in *Nachtigal.*

In sum, although the Court in *Nachtigal* made quick work of the facts before it, nothing in that *per curiam* opinion

indicates the Supreme Court's intention to discard decades of precedent instructing us to look to the legislatures in determining whether a particular maximum penalty represents a legislative judgment of seriousness.

II

Relying on Congress's definition of "petty offense" as an indication of what penalties equate with seriousness is particularly appropriate in this case. First of all, the defendants are charged with a federal crime. Given that Congress authorized the maximum penalties for a nonviolent first violation of the Act, an expression of Congress's judgment concerning what penalties are serious enough to warrant a jury trial is extremely probative of whether Congress believes that such a nonviolent first violation is a serious crime.

Additionally, a review of the legislative history attendant to 18 U.S.C. § 19 makes clear that the statutory definition of "petty offense" is direct evidence of Congress's judgment that a nonviolent first violation of the Act is a serious crime for purposes of the constitutional right to a jury trial. First, the legislative history indicates that Congress is aware of the Supreme Court's historical practice of looking to the congressional definition of "petty offense" in determining whether an offense's penalty indicates a legislative determination of seriousness.[6] Secondly, the legislative history shows that Con-

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[6] When Congress amended 18 U.S.C. § 1 in 1984, Criminal Fine Enforcement Act of 1984, § 8, 98 Stat. at 3138, it explained:

> There is, as a matter of law, no right to a jury trial for a petty offense . . . Since the constitution does not explicitly define what is petty, the courts have had to look elsewhere to determine whether a punishment . . . is petty or serious. In the interests of uniformity, objectively, and practical judicial administration, the courts have therefore looked to 18 U.S.C. § 1 as the monetary measure of a serious offense for the purposes of the right to jury trial.

gress enacted 18 U.S.C. § 19 for the sole purpose of expressing its legislative judgment concerning what penalties indicate a crime serious enough to merit a jury trial,[7] and that Congress

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H.R. REP. NO. 98-906 at 19-20 (citations and internal quotation marks omitted).

In enacting 18 U.S. C. § 19 to supersede 18 U.S.C. § 1, Criminal Fine Improvements Act of 1987, Pub. No. L. 100-185, § 4 (a) , 101 Stat. 1279,1274. Congress similarly noted:

> In *Frank v. United States*, the Supreme Court held that the constitutional right to trial by jury does not apply to petty offenses . . . The Supreme Court has indicated that 18 U.S.C. 1 is a measure of the seriousness of an offense for purposes of the right to trial by jury.

H.R. REP. NO. 100-390, 100th Cong. 1st Sess. 4-5 (1987), *reprinted at* 1987 U.S.C.C.A.N. 2140-41 (footnotes omitted).

[7] When 18 U.S.C. § 19 was enacted in 1987, Criminal Fine Improvements Act of 1987, § 4 (a), 101 Stat. at 1279, the House Report explains:

> Section 4 (a) of the bill amends chapter 1 of title 18, United States Code, to carry forward the definition of "petty offense." . . . The Sentencing Reform Act . . . repeals 18 U.S.C. 1 as of November 1, 1987. That repeal, together with other provisions enacted by the Sentencing Reform Act that set fine levels for misdemeanors at $25,000 for an individual and $100,000 for an organization, raises questions about when a jury trial is required for persons charged with minor misdemeanors . . . Section 4 (a) of the bill adds a new section (section 19) to 18 U.S.C. ch. 1 that carries forward the current definition of petty offense.

H.R. REP. NO. 100-390 at 4-5 (footnotes omitted).

Similarly, when 18 U.S.C. § 19 was amended in 1988, Anti-Drug Abuse Act of 1988, Title VII, § 7089, 102 Stat. 4187, 4409, the Senate Judiciary Committee noted that "[t]he amendment is needed to carry forward fully the concect of petty offense for purposes of the exception to the constitutional right to trial by jury," *Section Analysis of Judiciary Committee Issues in H.R. 5210,* § 7089, 134 CONG. REC. 32692, 32705 (Nov. 10, 1988) (remarks of Sen. Biden, Chairman of the Senate Judiciary Committee), and the House Judiciary Committee noted that "[t]he significance of the label 'petty offense' is that the constitutional right to a jury trial does not apply if a person is charged with a petty offense," *Section-*

has amended the definition to keep it current as a measure of which crimes are petty and which are serious.[8] Finally, and most importantly, the legislative history makes clear that Congress considers a crime punishable by up to six months in prison and a $10,000 fine to be a serious one, deserving of the right to a jury trial.[9]

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by-Section Analysis of Title VII, Subtitle 3, Minor and Technical Criminal Law Amendments, § 7089, 134 CONG. REC. 33296, 33301 (Oct. 21, 1988) (remarks of Rep. Conyers, Chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee).

[8] In 1984, Congress amended the maximum fine level in 18 U.S.C. § 1 from $500 to $5,000 for an individual and $10,000 for an organization. Criminal Fine Enforcement Act of 1984, § 8, 98 Stat. at 3138. The House Report explains the purpose of the amendment:

> The amount presently used in the definition of petty offense, $500, was set by Congress in 1930. The Committee is raising this figure to account for inflation. If a $500 fine for an individual was "petty" in 1930, when the per capita disposable income was $599, then $5,000 is "petty" today, when the per capita disposable income is $9,969.

H.R. REP. NO. 98-906 at 19 (citations omitted). Note that if the 1984 $5,000 figure is adjusted for inflation up to the present day, it reflects a legislative judgment that a fine levied on an individual is serious if it is greater than $7,317.34, an amount that is still much less than the $10,000 fine that could have been imposed upon the defendants in this case. (Inflation figures taken from the *1996 World Almanac*, with inflation calculated as the annual percentage change in the overall Consumer Price Index).

[9] When Congress enacted 18 U.S.C. § 19 in 1987, it defined "petty offense" as "a Class B misdemeanor, a Class C misdemeanor, or an infraction . . . ." Criminal Fine Improvements Act of 1987, § 4(a), 101 Stat. at 1279. The goal of this enactment was to carry forward the definition of "petty offense" as any crime for which a defendant could be punished by up to six months in prison, a $5,000 fine for an individual or a $10,000 fine for an organization, or both. H.R. REP. NO. 100-390 at 5. However, phrasing the definition of petty offenses only by reference to the federal classification system left open a few instances in which a Class B misdemeanor might be subject to fines higher than the $5,000 and $10,000 limits:

Now, I do not suggest that anything in 18 U.S.C. § 19 creates a statutory right to a jury trial. *See United States v. Kozel*, 908 F.2d 205, 207 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089, 111 S. Ct. 969, (1991). Nor do I contend that Congress's pronouncements absolutely dictate the boundaries of the constitutional right to a trial by jury. A legislature cannot by statutory enactment define the limits of a constitutional right, and both the Supreme Court and Congress have noted that 18 U.S.C. § 19 has no magical properties, no "talismanic significance." *See Muniz*, 422 U.S. at 477, 95 S. Ct. at 2190; H.R. REP. NO. 98-906 at 19-20.

But although 18 U.S.C. § 19 does not absolutely control the determination of what crimes are petty, it certainly must inform our decision. *See Kozel*, 908 F.2d at 207. As discussed above, relevant Supreme Court precedent instructs us to look to the judgment of the legislatures for guidance in determining whether a crime's authorized penalties clearly represent a legislative determination of seriousness. Where Congress has with its left hand expressly stated its judgment that a crime punishable by six months in prison and a fine

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> The 1987 amendments . . . did not accomplish [their] goal fully because the definition of petty offense did not specifically include a maximum fine level. . . . [T] he 1987 definition of petty offense inadvertently included a class of offenses which may be petty for constitutional purposes even though they are Class B or C misdemeanors . . .: offenses punishable by six months or less imprisonment which, by the terms of the statutes setting forth such offenses, carry a higher maximum fine than the $5,000 and $10,000 levels . . . .

Section Analysis of Judiciary Committee Issues in H.R. 5210, 134 CONG. REC. at 32705. In response to this problem, Congress amended the definition in 1988 to make clear its judgment that a fine above $5,000 for an individual or $10,000 for an organization renders an offense serious: "Section 7089(a) modifies the definition of petty offense in 18 U.S.C. § 19 by providing that a petty offense cannot call for a fine in excess of $5,000 for an individual and $10,000 for an organization . . . . " *Section-by-Section Analysis of Title VII, Subtitle B*, 134 CONG. REC. at 33301.

greater than $5,000 is serious, and has with its right hand enacted a law punishable by up to six months in prison and a $10,000 fine, there is clear evidence that Congress considers that crime to be serious. To consider such a crime petty and deny defendants charged with it the right to trial by jury, as the majority does today, is to contravene Supreme Court instruction by substituting a judicial determination as to seriousness for that of Congress. I would therefore vacate the defendants' convictions and remand for a retrial by jury.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

Plaintiff,

vs.

RONALD DEAN BROCK,
JAMES DANIEL SODERNA,
MICHAEL CHARLES SUHY,
DALE ROBIN PULTZ,
COLIN LESTER HUDSON, and
MARILYN RUTH HATCH,

Defendants.

94-CR-86 (JPS)

DECISION AND ORDER

FILED SEPT 23, 1994

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This criminal case comes before the court on several pretrial motions filed by a number of the defendants. They have moved to dismiss the charges, contending that the statute under which they have been charged is unconstitutional.[1] They have also moved for a bill of particulars, including a notice of intent to use evidence, and a jury trial. Each of the motions is now fully briefed[2] and ready for disposition.

FACTS

On June 6, 1994, each of the named defendants was formally charged by complaint with having violated § 3 of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248(a)(1). The complaint was based upon an affidavit prepared by Special Agent Matthew J. Gibson of the Federal Bureau of Investigation ("FBI"), which discloses the following facts.

On June 4, 1994, Affiliated Medical Services, Inc. ("Affiliated"), a Milwaukee medical clinic, had thirty-seven morning appointments for reproductive services scheduled. When the director of Affiliated arrived for work at 6:30 a.m., however, the two front entrances of the clinic were blocked. A Chevrolet station wagon was parked directly in the recessed area outside the southern doors, and completely blocked ac-

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[1] Technically, two motions to dismiss were filed. Attorney Thomas J. McClure filed a motion on behalf of defendant Marily Hatch. Attorney Eugene R. Pigatti filed a motion on behalf of defendants James Daniel Soderna, Dale Robin Pultz, and Colin Lester Hudson. Defendant Ronald Dean Brock subsequently joined in Attorney Pigatti's motion. Defendant Michael Charles Suhy has not filed a motion to dismiss.

In reviewing the motions to dismiss, I have reviewed all of the arguments made by counsel. This order disposes of both motions.

[2] Milwaukee Women's Medical Services, the American Civil Liberties Union, and the American Civil Liberties Union of Wisconsin prepared briefs opposing the defendants' motion to dismiss, and sought leave of the court to file those briefs as *amici curiae*. Leave is granted: those briefs have been considered by the court.

cess to those doors. Defendant Suhy was lying on the hood of the Chevrolet. A hole had been cut in the hood, and defendant Suhy had placed his two hands through the grill and the hole in the hood. The floor of the Chevrolet had been removed, and defendant Brock was sitting on the ground, with his torso extending into the passenger area of the vehicle. His right hand was placed inside a pipe that was attached to the frame of the vehicle with concrete and chains.

An AMC Hornet parked parallel to the street blocked access to the recessed area adjacent to Affiliated's northern entrance. The door of the Hornet had been welded shut, and the interior had been reinforced with concrete and metal reinforcing rods. Two holes had been cut in the Hornet's floor, and defendants Hudson and Soderna were sitting on the ground, with their torsos extending up into the passenger area of the vehicle. Defendant Hudson's right hand was handcuffed inside a pipe filled with concrete and bolted to an I-beam, which was welded to the Hornet's frame. Defendant Soderna's hand was handcuffed to concrete reinforcing rods welded to the inside of the automobile. His leg was attached by a metal pipe to the leg of defendant Pultz.

Defendant Pultz, defendant Hatch, and a juvenile were seated in the recessed area between the Hornet and the north entrance. In addition, a fifty-five gallon drum filled with concrete and metal reinforcing rods was placed in the recessed area.

Despite being ordered to do so by Milwaukee police officers, the defendants refused to move away from the clinic entrances. Their positions and the positions of the other obstacles prevented Affiliated staff from gaining access to the clinic. They were not able to gain access until 9:15 a.m., after Milwaukee police had forcibly removed two of the individuals blocking the northern entrance to the clinic. After staff gained access to the clinic, they were able to open a fire es-

cape entrance that had not been blocked, to provide an entrance to the clinic.

Only twenty of the thirty-seven patients with appointments actually received reproductive health services at Affiliated that morning.

On June 10, 1994, the United States Attorney in this district filed an information charging each of the defendants as follows:

> [O]n June 4, 1994, at Affiliated Medical Services, 1428 North Farwell Avenue, a facility that provides reproductive health services . . . the defendants herein, did by physical obstruction intentionally intimidate and interfere, and attempt to intimidate and interfere, with persons because they were obtaining reproductive health services, and persons because they were providing reproductive health services, and in order to intimidate any persons from obtaining and providing reproductive health services;
>
> All in violation of Title 18, United States Code, Section 248(a)(1).

THE STATUTE

FACE provides for the imposition of civil and criminal penalties against anyone who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . .

18 U.S.C. § 248(a)(1). "Interfere with" is defined as "to restrict a person's freedom of movement." *Id.* § 248(e)(2). A person "intimidates" another person when that person is placed "in reasonable apprehension of bodily harm to him- or

herself or to another." *Id.* § 248(e)(3). "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." *Id.* § 248(e)(4). "Reproductive health services" refers to "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." *Id.* § 248(e)(5). "[F]acility includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located." *Id.* § 248(e)(1).

Violations of FACE involving exclusively nonviolent physical obstruction[3] carry penalties of up to six months incarceration and a fine of not more than $10,000.[4] FACE also provides for civil remedies. *Id.* § 248(c).

Finally, FACE includes a First Amendment saving clause:

> . . . Nothing in this section shall be construed –
>
> (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected by the First Amendment to the Constitution...

Id. § 248(d).

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[3] As charged in this case. The penalties are greater for violations involving violence, force, or the threat of force. *See* 18 U.S.C. § 248(b).

[4] For first offenses, as the defendants here obviously face. For subsequent offenses, FACE provides for jail terms up to eighteen months and a fine of not more than $25,000. If the FACE violation results in bodily injury or death, FACE provides for jail terms up to 10 years and life, Respectively.

DISCUSSION

The defendants argue that FACE is constitutionally infirm because it is a content-based or viewpoint-based regulation of expressive activity and because it is vague and overbroad.[5] They also argue that they are entitled to a bill of particulars, notice of intent to use evidence, and a jury trial. I will address each of these arguments in turn.

I

A government regulation that limits communication because of the message it conveys is considered a "content-based" regulation, and is subject to the strictest judicial scrutiny. The defendants argue that FACE is such a regulation.[6]

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[5] Defendant Hatch also argues that the criminal information in this case is insufficient because it fails to (1) identify her conduct that constituted "physical obstruction" and (2) identify a "person" whose access she obstructed.

From a constitutional and statutory standpoint, an indictment or information must (1) adequately apprise the defendant of the charge against her so that she can prepare her defense and (2) establish a record that shows when the defense of double jeopardy may be available to the defendant in the event future proceedings are brought against her. *United States v. Hinkle*, 637 F.2d 1154, 1157 (7th Cir. 1981) (citing, *inter alia*, *Russell v. United States*, 396 U.S. 749, 763-64 (1962)). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117 (1974).

In the instant case, the information tracks the language of FACE, including all the elements of the offense charged, and provides the date and location of the relevant events. The information will not be dismissed as insufficient. Ms. Hatch has been adequately charged with the offense against her and a sufficient record has been established for double jeopardy purposes.

[6] The defendants' primary argument is framed in First Amendment terms. Defendant Hatch, however, does raise an alternative argument based on the equal protection aspect of the Due Process Clause of the

A

Initially, I must determine whether the defendants' activity, as described in the June 10 information, is protected by the First Amendment.

The Supreme Court has rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Wisconsin v. Mitchell*, __ U.S. __, __, 113 S. Ct. 2194, 2199 (1993) (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *R.A.V. v. City of St. Paul*, __ U.S. __, __, 112 S. Ct. 2538, 2544 (1992); *Spence v. Washington*, 418 U.S. 405, 409 (1974) (*per curiam*); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)). As a result, the First Amendment does not protect the use of force or threats of force.[7] *See NAACP v.*

Fifth Amendment. No one has suggested, however, that anti-abortion protesters (or, more accurately, individuals seeking to prevent others from providing or obtaining reproductive health services) make up a suspect classification for equal protection purposes. As a result, unless the defendants can demonstrate a burden or penalty on a fundamental right (i.e., freedom of speech), any equal protection claim would be subject only to rational basis analysis. Under such an analysis. FACE would certainly be valid.

Consequently, defendant Hatch's equal protection argument is essentially a derivative argument; it must necessarily fail unless she can first demonstrate that FACE unnecessarily burdens her freedom of speech rights.

[7] Counsel for defendants Soderna, Pultz, and Hudson is particularly concerned about FACE's proscription of "threat[s] of force." He argues that (1) because that proscription is not explicitly limited to "genuine" threats, it is unconstitutional; and (2) because that proscription is not limited to the traditional "fighting words" and "incitement to imminent lawless action" categories, it is unconstitutional. I find neither argument persuasive. It is well-settled that, notwithstanding the "fighting words" and subversive advocacy doctrines, the First Amendment does not prohibit Congress from outlawing threats. *See, e.g., United States v. Watts*, 394 U.S. 705, 707 (1969) (18 U.S.C. § 871(a)); *United States. v. Bellrichard*, 994 F.2d 1318, 1318 (8th Cir.) (18 U.S.C.; § 876), *cert. denied*, __ U.S. __, 114 S. Ct. 337 (1993); *United States v. Hoffman*, 806 F.2d 703,

Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."); *Watts v. Unites States*, 394 U.S. 705, 707 (1969) (18 U.S.C. § 871(a), which criminalizes threats against the President, is constitutional on its face); *United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir.) ("The First Amendment affords no protection to those who utter direct threats of force and violence toward other persons."), *cert. denied*, __ U.S. __, 114 S. Ct. 337 (1993); *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th

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706-07 (7th Cir 1986) (18 U.S.C. § 871), *cert. denied*, 481 U.S. 1005 (1987); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982) ("Unquestionably, these individuals [that engaged in violence or threats of violence] may be held responsible for injuries that they caused."). Moreover, Congress need not explicitly limit FACE to "true threats" to comply with the First Amendment: as with other statutes criminalizing threats, the courts will infer such a limitation. *See, e.g., Watts*, 394 U.S. at 707.

The defendants also object to FACE's reference to the reactions of listeners. In FACE, "intimidat[ion]" is defined as that conduct which "place[s] a person in reasonable apprehension of bodily harm to him- or herself or another." 18 U.S.C. § 248(e)(3). The defendants argue that, because this passage makes application of the statute depend on the impact of the communication on its audience, FACE is inherently content-based. I disagree. The "reasonable apprehension" language in FACE appears to be a reasonable attempt to limit application of the statute to "true threats." *See, e.g., United States v. Aman*, 31 F.3d 550, 553 (7th Cir. 1994) (defining a threat as "whether the recipient could reasonably have regarded the defendant's statement as a threat"); *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1933) ("implicit in the nature of such punishable threats is a reasonable tendency to produce in the victim a fear that the threat will be carried out"). *Cf. United States v. Lee*, 6 F.3d 1297, 1301 (8th Cir. 1993) (en banc) (18 U.S.C. § 241 unconstitutional as applied because defendant punished for threats of force that were not "true threats"), *cert. denied*. __ U.S. __, 114 S. Ct. 1550 (1994). Thus, it is distinguishable from the emotive impact language disapproved of by the Supreme Court in *Boos v. Barry*, 485 U.S. 312, 321 (1988).

For further discussion of FACE's intimidation provisions, *see infra* note 20.

Cir.), *cert. denied*, 498 U.S. 986 (1990) (upholding conviction under 18 U.S.C. § 876, mailing threatening communications).

FACE, however, prohibits more than just force and threats of force. It also proscribes certain nonviolent forms of "physical obstruction." 18 U.S.C. 248(a). In fact, the information in this case is based on such "physical obstruction." Thus, I must decide whether nonviolent physical obstruction, as practiced by the defendants in this case, can constitute protected activity under the First Amendment.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, the Supreme Court has looked to whether "an intent to convey a particularized message was present, and [w]hether the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-11). Both parts of this inquiry are informed by the context in which the conduct took place. *Id.* at 405; *Spence*, 418 U.S. at 410. With these principles in mind, the Court has extended First Amendment protections to students wearing armbands to protest America military involvement in Vietnam, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969); black persons "sitting-in" at a public library to protest segregation, *Brown v. Louisiana*. 383 U.S. 131, 141-42 (1966); a protester wearing an Army uniform during a skit protesting American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58, 62 (1970); protesters displaying picket signs and distributing leaflets outside a courthouse, *United States v. Grace*, 461 U.S. 171, 176 (1983); black persons boycotting white merchants, *Claiborne*, 458 U.S. 886, 915 (1982); individuals desecrating or burning flags, see *Johnson*, 491 U.S. at 406; *Spence*, 418 U.S. at 410; demonstrators sleeping in parks, *Clark v. Community for Creative Non-Violence*, 498 U.S. 288, 293 (1984) (application of First Amendment presumed under the circumstances); and

an individual burning a cross in a black family's yard. *R.A.V.*, 112 S. Ct. at 2548 ("expression of group hatred").

At first glance, these cases seem to support the proposition that the defendants' blockade of Affiliated is similarly protected by the First Amendment. I do not doubt that the defendants, by blockading Affiliated, intended "to convey a particularized message.[8] Moreover, it is likely that those viewing the blockade understood that message.

The problem, however, is the vehicle for that message. When a message is conveyed through an activity that "bears no necessary relationship to the freedom to . . . distribute information or opinion," the government may proscribe that activity notwithstanding the impact on the message. *Cameron v. Johnson*, 390 U.S. 611, 617 (1968)(quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)). Thus, courts have generally held that messages delivered via physical obstruction, like messages delivered through the use or threat of force, are not protected under the First Amendment. *Id.* at 616-17; *Cox v. Louisiana*, 379 U.S. 559, 563-64 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."); *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989) ("blocking access to public and private buildings has never been upheld as a proper method of communication in an orderly society"); *United States v. Bader*, 698 F.2d 553, 555-556 (1st Cir. 1983) (blocking access to Post Office and Courthouse Building not protected).

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[8] I realize, however, that, by blockading the clinic, the defendants not only expressed a message, but also effectively enforced that message by preventing individuals from obtaining reproductive health services, including constitutionally protected abortions.

In sum, the government and *amici* make a strong argument that, under the relevant case law, the defendants' actions in blockading the clinic are simply not entitled to First Amendment protection. I did not hesitate to apply such a categorical approach to the use of force or threats of force. *See* discussion, *supra*. I do hesitate, however, to apply it to nonviolent "physical obstruction." Ultimately, this apparent contradiction is a natural consequence of the courts' historical treatment of a number of activities, including leafletting, picketing, civil rights demonstrations, and boycotts.[9] Traditionally, those activities have been recognized as inextricably intertwined with the rights of speech or petition.[10] Although the defendants' actions in this case may not resemble those traditional forms of protest, FACE could potentially reach such traditional forms of protest. Consider, for example, the case of the anti-abortion protester who, by his nonviolent leafleting or picketing activities, renders passage to a facility "unreasonably difficult or hazardous." Would it make sense to completely deny such activity First Amendment protection? Could the government explicitly regulate such activity according to the content of its message?

Given these concerns, and the defendants' arguments that FACE is (1) facially invalid and (2) invalid even as a regulation of unprotected activity, I will proceed[11] to consider

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[9] It is also important to note that the use of categories in constitutional law stems, at least in part, from a desire to preserve judicial resources, e.g, the realization that we can't "make a federal case" out of every dispute that comes along. In the instant case, that desire must be balanced against the historically favored position of demonstrations and protests.

[10] With respect to the historical treatment of nonviolent demonstrations, *see* Lawrence Tribe, *American Constitutional Law* 829-30 (1988).

[11] Because I have recognized that the defendants' actions in this case are not entitled to First Amendment protection, the following section (Part 1B) could be considered a form of overbreadth analysis.

whether FACE's physical obstruction provision[12] is content-neutral, and, if not, whether it is "necessary to serve a compelling state interest and . . . narrowly tailored to serve that end." *Burson v. Freeman*, __ U.S. __, 112 S. Ct. 1846, 1851 (1992).[13]

B

In enforcing the First Amendment, courts have been concerned first and foremost with regulations that target speech or expressive activity on the basis of the content of its message.[14] Content-based regulations are preemptively invalid,

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[12] As I discussed above, I believe that no such review of FACE's provisions governing the use of force and threats of force is necessary, except with respect to the defendants' argument based on the Supreme Court's decision in *R.A.V.* *See* discussion, *infra*. Similarly, notwithstanding the many references in the parties' papers, I don't believe any review of FACE's proscription against interference with the exercise of religious freedom or with the destruction of property is warranted.

[13] As I discussed above, FACE does include a First Amendment saving clause. Although such clauses may be helpful in determining legislative intent, using them to decide whether any particular activity is entitled to First Amendment protections would appear to be a rather circular approach. Consequently, in deciding to proceed to determine whether FACE is content-based, I did not give that clause any weight.

[14] Dean Stone has explained the judicial focus on content-based limitations:

> It may seem odd that the Court uses a stricter standard of review for content-based restrictions than for content-neutral restrictions, since both "reduce the sum total of information or opinion disseminated." The explanation for this seeming anomaly is that the first amendment is concerned not only with the extent to which a law reduces the total quantity of communication, but also -- and perhaps even more fundamentally -- with at least three additional factors: distortion of public debate, improper motivation, and communicative impact. These three factors, which are most clearly presented by content-based restrictions, explain both why the Court tests virtually all content-based restrictions of high-value speech

and can only be saved if the government demonstrates that "the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Burson v. Freeman*, __ U.S. __, 112 S. Ct. at 1851 (citing, *inter alia*, *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)).

The analytical difficulty lies in determining which regulations are content-based, and which are content-neutral.[15] Where "speech" and "non-speech" element are combined in the same course of conduct, the standard for neutrality has been articulated in at least two ways. At times, the content-neutrality determination has turned on whether the governmental interest in enacting the statute is "unrelated to the suppression of free expression." *See, e.g., Johnson*, 491 U.S. at 407. At other times, the inquiry has focused on whether the regulation is "*justified* without reference to the content of the regulated speech." *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).

Regardless of the articulation of the standard, it is clear that our concern is with governmental motivation. *See, e.g., Ward*. 491 U.S. at 791 ("the principal inquiry in determining content neutrality . . . is whether the government has adopted

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> with a single, strict standard of review, and why it does not apply that same standard to all content-neutral restrictions.

Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 54-55 (1987).

[15] On the issue of whether FACE is content neutral, I agree with the defendants' argument that the Supreme Court's recent opinion in *Madsen v. Women's Heath Ctr., Inc.*, __ U.S. __, 114 S. Ct. 2516, is not particularly helpful. In considering the issue of content-neutrality in that case, the Court really only considered the fact that (1) "the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order" and (2) "[t]here is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion." 114 S. Ct. at 2523-24. My inquiry must necessarily be much broader.

a regulation of speech because of disagreement with the message it conveys."). Judicial scrutiny of that motivation varies widely, however. *Compare United States v. O'Brien*, 391 U.S. 367, 378-83 (1968) (Court accepted proffered government purposes, and refused to look into actual congressional motive); and *Barnes v. Glen Theater*, 501 U.S. 560, 568-70, 582-83 (1991) (opinion of the Court, and Souter, J., concurring) (majority opinion inflating the government's interest, and concurring opinion searching for, and finding, hypothetical interest, to justify nude dancing statute); *with Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (inferring impermissible motive despite reasonable alternative explanation); and *Spence*, 418 U.S. at 411 ("we must examine with particular care the interests advanced by appellee to support its prosecution"). These cases do not necessarily make the objective tests recited above any clearer; they do demonstrate, however, that governmental motivation can be inferred from a number of factors, including the nature of the governmental interest, the extent to which the regulation is narrowly tailored to further that governmental interest, the nature of the restricted expression, and the existence of alternative means for that expression.[16]

In support of the physical obstruction provisions of FACE, the government asserts "compelling interests in ensuring access to reproductive health services and promoting the free flow of goods and services in interstate commerce." Government's Response to Defendants' Pretrial Motions at

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[16] Doctrinally, consideration of these factors is reserved until *after* the determination on content-neutrality (to determine whether a content-neutral statute is valid under the First Amendment). In practice, however, consideration of these same factors can help us determine the legislative motive behind any particular regulation. For example, regulations that are narrowly tailored to serve interests other than suppression of expression are less likely to be targeted at expression.

20.[17] The legislative history provides extensive evidence of the effect of clinic blockades and harassment on the number of clinics providing reproductive services, the number of doctors willing to work at those clinics, the number of patients able to obtain services, and the clinics' ability to provide those patients with effective services. *See* S. Rep No. 117, 103d Congress, 1st Session 12-15 (1993). The legislative history also details the inadequacy of local efforts to address these access issues. *Id.* at 15-18.

FACE's prohibition of physical obstruction addresses these concerns directly. By protecting ingress to and egress from clinics. FACE ensures that access to reproductive health services is not further eroded. By providing for federal criminal and civil remedies, FACE ensures that this access is not dependent upon the vagaries of local police, prosecutors, and courts. Moreover, the possibility of impermissible motive in this case appears remote: Congress' interest in access is a compelling one; FACE addresses that interest directly and narrowly; and FACE leaves open alternative channels for communication of any "messages" it might proscribe. Finally, FACE's saving clause provides further evidence that Congress was aiming at conduct, not expressive activity.

Despite this extensive evidence of a governmental interest "unrelated to free expression," the defendants argue that the government, in enacting FACE, was actually targeting expression. In support of this argument, they argue that its intent requirement[18]

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[17] It is clear that FACE also serves several other interests, including "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"; "ensuring the public safety and order"; "protecting the property rights of its citizens"; and protecting "medical privacy." *See Madsan v. Womens' Health Ctr., Inc.*, __ U.S. __, __, 114 S. Ct. 2516, 2526 (1994).

[18] The defendants also appear to challenge FACE's limitation to facilities providing reproductive health services. FACE is not content-based simply because it focuses on reproductive health services facilities and activity outside those facilities. In regulating speech and expressive con-

makes FACE a content-based restriction[19] on speech.[20]

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duct, Congress is free to legislate one problem at a time as long as they don't legislate on the basis of the content of the speech or message. As a result, content-neutral regulations that target particular locations do not violate the First Amendment. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (residences); *Boos*, 485 U.S. at 331 (foreign embassies); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (schools); *Cox*, 379 U.S. at 563 (courthouses). In fact, such targeting may actually insulate otherwise invalid regulations. *See Boos*, 485 U.S. at 331 (in upholding congregation restriction against First Amendment challenge, Court cites favorably the fact that "[u]nlike a general breach of the peace statute, . . . the congregation clause is site specific; it applies only within 500 feet of foreign embassies").

[19] The defendants also argue that FACE's obstruction provisions discriminate based on *viewpoint*. They argue FACE targets messages on one side of the "reproductive health services" debate, i.e., anti-abortion messages. I disagree. The language of the statute does not support such a conclusion; on its face, the statute applies equally to activities directed at the patients and staff of abortion clinics and the patients and staff of centers that counsel women against abortion and in favor of its alternatives. I refuse to assume pretext from FACE's legislative history. The court has been presented with no evidence that the Justice Department wouldn't apply this statute to control violent and obstructive pro-choice protesters.

In support of its argument that FACE only applies to one side of the debate, the defendants argue that FACE would not apply to the following actions taken by abortion rights *advocates*: (1) physically obstructing access to (or firebombing) a Catholic hospital solely because that hospital refuses to perform abortions; and (2) shoving an anti-abortion protester outside of a clinic. Under both examples, however, the result would be the same if the action was taken by a pro-life demonstrator at a facility that refuses to perform abortions. This is entirely consistent with the true government interest behind FACE, access to reproductive health *services* (as opposed to access to reproductive health services *facilities*). Absent the necessary intent to deprive someone from obtaining or providing *services*, FACE simply does not apply.

[20] The defendants also argue that the legislative history of FACE provides evidence of Congress' illegitimate motive. They provide little or no evidence in support of this argument, however, and, as a result, I will reject it.

In support of their claim that FACE is content-based, the defendants offer the following reasoning. First, FACE proscribes only that physical obstruction that is motivated by an intent to prevent people from or punish people for providing or obtaining reproductive health services. 18 U.S.C. § 248 (a)(1). Second, FACE *does not* proscribe physical obstruction motivated by other concerns. As a result, the argument goes, whether FACE applies or not depends on the content, or subject matter, of the obstructer's message.

The defendant's attack on FACE's intent requirement can be divided into three parts. Initially, the defendants argue that the intent requirement makes FACE content-based on its face. Generally, however, a motive requirement will not in and of itself make a regulation "related to the suppression of

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In addition, as I discussed earlier, *supra* note 7, the defendants object to FACE's reference to the reactions of listeners. Under FACE, "intimidat[ion]" is defined as that conduct which "place[s] a person in reasonable apprehension of bodily harm to him or herself or another." 18 U.S.C. § 248(e)(3). As a result, physical obstruction is actionable not only when it restrains a person's freedom of movement, but also when it places that person in reasonable apprehension of bodily harm.

There are several reasons why I don't believe an intimidation by physical obstruction charge presents any constitutional problems. First, any challenge to such a charge would essentially be based on the general rule of *R.A.V.*, which, as I discuss below, does not apply to FACE. Second, FACE's definition of physical obstruction limits any concerns of government or audience censorship. Any prosecution for physical obstruction limits any concerns of government or audience censorship. Any prosecution for physical obstruction will still require, as a threshold matter, proof of an act that renders access to a facility unreasonably difficult or impossible. Third, such a charge is valid for the same reason an intimidation by threat prosecution is valid. In enacting FACE, Congress could have outlawed all acts of physical obstruction, regardless of whether anyone was actually seeking access. By requiring, however, that the government prove injury, interference, or intimidation, Congress has helped put FACE in the proper context by limiting prosecution to cases that actually affect access. By doing so, Congress has essentially insured that FACE is limited to "true" physical obstructions. *See supra* note 7.

free expression." State and federal antidiscrimination and civil rights laws do not violate the First Amendment simply because they proscribe only those acts taken with a certain motive. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (Title VII); *Roberts v. United States Jaycees*, 468 U.S. 609, 628-29 (1984) (state antidiscrimination law); *United States v. J.H.H.*, 22 F.3d 821, 826 (8th Cir. 1994) (18 U.S.C. § 241 and 42 U.S.C. § 3631); *United States v. Hayward*, 6 F.3d 1241, 1251 (7th Cir. 1993) (42 U.S.C. § 3631), *cert. denied*, __ U.S. __, 114 S. Ct. 1369. *Cf. Mitchell*, __ U.S. __, 113 S. Ct. at 2200 (reaffirming validity of federal and state antidiscrimination laws); *R.A.V.*, __ U.S. at __, 112 S. Ct. at 2546 (reaffirming validity of Title VII).

The defendants argue, however, that their behavior is more analogous to sit-ins or picketing, and thus that the case law on civil rights laws and antidiscrimination laws simply is not relevant. Even if the analogy were a good one, the Supreme Court's jurisprudence on picketing simply does not support this argument. Just as the government may proscribe employment decisions, *Hishon,* 467 U.S. at 78, membership decisions, *Roberts,* 468 U.S. at 628-29, and threats, *Hayward*, 6 F.3d at 1251, only when they are made with a certain intent, it may also proscribe picketing only when it is performed with a certain intent. The Court has consistently upheld the state's right to regulate, and even proscribe picketing "in furtherance of . . . unlawful objectives." *Int'l Brotherhood of Electrical Workers v. Labor Board*, 341 U.S. 694, 705 (1951) (secondary boycotts). *See, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502-03 (1949) (antitrust laws); *Cameron*, 390 U.S. at 617 (blocking the entrances to courthouses). To the extent that FACE proscribes picketing, it proscribes only picketing "in furtherance of . . . unlawful objectives," i.e., picketing for the purpose of blocking access to a reproductive health services facility.

Second, the defendants argue that even if FACE's intent requirement does not make it content-based on its face, it pro-

vides evidence of illegitimate Congressional motive.[21] In support of this argument, the defendants cite the Supreme Court's decision in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). In that case, the Supreme Court considered a City of Chicago ordinance that limited picketing and demonstrating near school grounds, but explicitly exempted "the peaceful picketing of any school involved in a labor dispute." *Id.* at 93 In invalidating the ordinance,[22] the Court focused on Chicago's "wholesale exclusion of picketing on all but one preferred subject," and the resultant poor fit between the statute's provisions and the City's professed interest in school disruption. *Id.* at 100-02; *cf. Brown*, 447 U.S. at 461 (invalidating an Illinois state statute barring picketing of residences, but explicitly exempting "the peaceful picketing of a place of employment involved in a labor dispute"). In doing so, the Court implicitly called into question the sincerity of the City's professed interest.

Similarly, the defendants argue, Congress in FACE has betrayed its interest in suppressing messages on one disfavored subject (reproductive health services) by implicitly exempting all other messages. There are at least three reasons why this argument is not persuasive. First, the ordinance in *Mosley* explicitly excluded labor picketing form its scope. There is no such explicit exclusion in FACE. Second, FACE, unlike the Chicago ordinance, is targeted at obstruction, not picketing. *See, State v. Migliorino*, 442 N.W.2d 36, 45 (Wis.

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[21] As defendant Hatch argues, in discussing the "because. . ." language:

> Congress's repeated insertion of this peculiar phrase belies any claim that intimidation of anti-abortion protesters was not at least one of the objects of the legislation. Were the law's sole object to guarantee access to abortion clinics, the motive for impeding such access would be immaterial.

[22] The Court in *Mosley* and in *Carey* invalidated the ordinances on Equal Protection grounds. The analysis essentially mirrored the First Amendment content-based analysis.

1989) (upholding statute limiting access to medical facilities against constitutional challenge despite labor exception), *cert. denied*, 493 U.S. 1004; *cf. Boos*, 485 U.S. at 332-34 (rejecting a claim based on *Mosley*). Third, unlike the ordinance in *Mosley*, there is an excellent "fit" between the means employed in FACE and the government interests at stake. Given these distinctions, FACE's "labor exemption" (if indeed there is such an exemption[23]), unlike the exemption in *Mosley*, provides me with very little reason to doubt Congress' stated motives for enacting FACE.

Finally, the defendants argue that FACE's intent requirement makes it invalid even if it only reaches conduct that is fully proscribable. In *R.A.V. v. City of St. Paul*, the Supreme Court announced a new general rule: although governmental entities may proscribe entire categories of "speech" (such as "fighting words"), it may be impermissible for them to selectively proscribe within those categories along content-based lines. __ U.S. __, 112 S. Ct. 2538, 2544-45 (1992). In announcing this rule, the Court also explicitly abandoned its categorical approach to "fighting words." *Id.* at 2543.[24] It applied this new rule to invalidate a cross burning prosecution under a bias-motivated crime ordinance which, pursuant to state supreme court interpretation, proscribed only those

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[23] Labor protesters would be subject to FACE if, as is likely, they intended to prevent people from obtaining or providing reproductive health services.

[24] The court explained this abandonment in the following way:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," . . . or that the "protection of the First Amendment does not extend" to them. . . . Such statements must be taken in context . . . What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) -- not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.

fighting words that "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." *Id.* In the instant case, the defendants argue that, although Congress could, consistent with the First Amendment, have proscribed all force, threats, and obstruction, *R.A.V.* precludes it from proscribing only those instances of force, threats, and obstruction motivated by a desire to prevent or punish access to reproductive health services.

This argument assumes, however, that the Court in *R.A.V.* abandoned all categorical distinctions in First Amendment analysis. It did not. By creating an exception to the general rule for regulations "directed at conduct rather than speech,"[25] the Court explicitly retained a categorical distinction between regulations "directed at conduct" and regulations "directed at speech." In later cases, this distinction has been reaffirmed, and the conduct category has been expanded to include potentially expressive activities that "inflict greater

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[25] The Court described the exception in the following way:

> Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is *"justified* without reference to the content of the . . . speech," . . . Moreover, since words can in some circumstances violate law directed against speech but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech . . . . Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practice. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., __ U.S. __, 112 S. Ct. at 2546-47.

individual and societal harms."[26] *Mitchell*, __ U.S. __, 113 S. Ct. at 2200-01; *cf. Roberts*, 468 U.S. at 628 (acts of invidious discrimination, "like violence or other types of potentially expressive activities that produce special harms distinct from

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[26] Unfortunately, the court's categorical distinction between statutes that are "directed at speech" and those that are "directed at conduct" is likely to be difficult to apply and open to manipulation.

Consider, for example, the ordinance that was challenged in the *R.A.V.* case itself. Clearly, that ordinance could be described as being directed primarily at expressive activities that "inflict greater individual and societal harms" or that "produce special harms distinct from their communicative impact." Nonetheless, the Supreme Court held that it was "directed at speech."

The categorical distinction is particularly difficult to apply to statutes that proscribe threats. Generally, threats involve words, or "speech." Moreover, in the *R.A.V.* case itself, the Court implicitly suggested that threats did not fail within its exception for statutes "directed at conduct." *See R.A.V.*, __ U.S. __, 112 S. Ct. at 2546 (describing 18 U.S.C. § 871, which proscribes threats against the President, as fully subject to its general rule). Nonetheless, as I discuss below, at least one panel in this circuit has held that a civil rights statute selectively proscribing threats of force is "directed at conduct" and thus not subject to the *R.A.V.* general rule. *Hayward*, 6 F.3d at 1251 (42 U.S.C. § 3631, as applied to cross-burning incident); *cf. J.H.H.*, 22 F.3d at 826 (holding that 18 U.S.C. § 241 and 42 U.S.C. § 3631 fall within a separate exception to *R.A.V.*); *but cf. United States v. Lee*, 6 F.3d 1297, 1301-02 (8th Cir. 1993) (en banc) (Gibson. J., concurring) (as applied to prosecution for cross-burning, 18 U.S.C. § 241 does not fail within *R.A.V.* exception for laws directed at conduct), *cert. denied*, __ U.S. __, 114 S. Ct. 1550 (1994).

Thus, the application of *R.A.V.*'s categorical distinction between regulations "directed at conduct" and those "directed at speech" may be problematic in many cases. But perhaps the categorical approach is the only way to reconcile the rather radical holding of *R.A.V.* with the legitimate government interest in selectively punishing certain groups or individuals. *Cf. Hayward*, 6 F.3d at 1258-62 (Flaum, J., concurring) (rejecting application of the "directed at conduct" exception to 42 U.S.C. § 3631, which selectively proscribes threats of force, but ultimately resting the justification for the statute on a similarly unsatisfying distinction between statutes that selectively proscribe particular messages and those that selectively proscribe speech aimed at certain persons or groups.)

their communicative impact, . . . are entitled to no constitutional protection").

As a result, at this point, my analysis comes full circle. In part IA, *supra* I concluded that, as a general matter, force, threats, and acts of physical obstruction are all examples of "conduct" that is not entitled to First Amendment protection. However, because I felt that FACE, as written, could reach activities entitled to first Amendment protection (e.g., picketing, leafletting, etc.), I went on to consider, in this part (Part IB), whether FACE is a content-neutral statute.

Now, FACE's focus on conduct, which almost doomed the defendants' constitutional challenge from the outset, has returned to extinguish their argument based on *R.A.V.* Because *R.A.V.* does not apply to statutes that are "directed at conduct," it does not apply to FACE, which is primarily, or even entirely, "directed at conduct."

This assumes, however, that our definition of "conduct" has not changed. With respect to the use of force, this seems to be a safe assumption. *See, e.g. Mitchell*, __ U.S. __, 113 S. Ct. at 2201. Moreover, at least one panel in this circuit has held that a civil rights statute that selectively proscribes threats or force is similarly "directed at conduct" and thus not subject to the *R.A.V.* general rule. *Hayward*, 6 F.3d at 1251 (42 U.S.C. § 3631); *cf. J.H.H.*, 22 F.3d at 826 (holding that 18 U.S.C. § 241 and 42 U.S.C. § 3631 fall within separate exception to *R.A.V.*); *but cf. United States v. Lee*, 6 F.3d 1297, 1301-02 (8th Cir. 1993) (*en banc*) (Gibson J., concurring) (as applied to prosecution for cross burning, 18 U.S.C. § 241 does not fall within *R.A.V.* exception for laws directed at conduct), *cert. denied.* __ U.S. __, 114 S. Ct. 1550 (1994). Finally, although there has been no case law on the subject, it seems clear to me that physical obstruction is "conduct" for *R.A.V.* purposes.

Thus, the defendants' three-part argument is not persuasive. FACE's intent requirement does not make it a content-

based restriction on speech. Rather, it is "*justified* without reference to the content of" any regulated speech and serves a governmental interest "unrelated to the suppression of free expression." As a result, to the extent that it regulates expressive conduct, it should be analyzed as a time, place, and manner restriction on speech.[27]

C

The Supreme Court has articulated a number of different standards of review for content-neutral[28] regulations such as FACE.[29] Each standard requires a court to balance the "extent to which the communicative activity is in fact inhibited" with the "values, interests, or rights served by enforcing" the regulation. Lawrence Tribe, *American Constitutional Law* 979 (1988).[30] Generally, however, content-neutral regulations are

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[27] The Supreme Court has analyzed content-neutral regulations that regulate both speech and conduct as, alternatively, time, place, and manner regulations of speech, and regulations of symbolic conduct. *Compare Clark*, 468 U.S. at 293 ("time, place and manner regulations" are valid if they "are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information") *with O'Brien*, 391 U.S. at 377 (a content-neutral regulation of symbolic speech is justified if "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). In recent cases, the Court has recognized that there is little, if any difference between these two standards. *Clark*, 468 U.S. at 298. I will analyze FACE as a time, place and manner regulation of speech.

[28] Professor Tribe has described content neutral regulations as those for which "government does not *aim* at ideas or information but seeks a goal independent of communicative content or impact, with the *indirect* result that the flow of information or ideas is in some significant measure constricted." Lawrence H. Tribe, *American Constitutional Law* 977-78 (1988).

[29] *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 48-50 (1987).

[30] *See also* Stone, *supra*, at 58:

valid if (1) they are narrowly tailored to serve a significant or substantial governmental interest and (2) they leave open ample alternative channels for communication of the information. *See Clark*, 468 U.S. at 293. Although regulations must be narrowly tailored to serve the government's legitimate, content-neutral interests, they "need not be the least restrictive or least intrusive means of doing so." *Ward,* 491 U.S. at 798. The requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799.

In the instant case, the interests served by FACE far outweigh its inhibitive effect on communicative activity. As I discussed above, the governmental interests in ensuing access to reproductive health services and preventing violence outside clinics are compelling, and FACE narrowly addresses those interests. Given the extensive record of violence, threats, and harassment at clinics prior to FACE, it is clear that the Government's interests "would be achieved less effectively absent the regulation." On the other hand, if in fact FACE inhibits expressive or communicative activity, that inhibition is slight indeed. Even under FACE, protesters may go to clinics and express their message -- that abortion is wrong -- to doctors, staff, and clients, as long as they refrain from the use of force, threats of force, and physical obstruction.

The Court does not speak explicitly in these terms. There is a strong correlation in practice, however, between the extent to which a challenged law actually interferes with the opportunities for free expression and the Court's use of the strict, intermediate, and deferential standards of review identified earlier. When the challenged restriction has a relatively severe effect, the Court invokes strict scrutiny. When the challenged restriction has a significant but not severe effect, the Court employs intermediate scrutiny. And when the restriction has a relatively modest effect, the Court applies deferential scrutiny.

In short, FACE is a content-neutral that (1) is narrowly tailored and (2) leaves anti-abortion protesters with ample alternative means of communicating their message. As as result, it does not violate the First Amendment.

II

The defendants also argue that FACE is overbroad and vague, and that it violates the Religious Freedom Restoration Act ("RFRA"). I will comment briefly on each of these arguments. First, FACE is not overbroad. In considering the overbreadth of statutes, the Supreme Court has stated that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As I discussed in Part I, to the extent that FACE reaches expressive activity, it is a permissible time, place, and manner regulation of that activity. As a result, FACE is not only not "substantially" overbroad, it is not overbroad at all.[31]

Second, FACE is not impermissibly vague. "[T]he ordinary person exercising ordinary common sense can sufficiently understand" its terms. *Broadrick*, 413 U.S. at 608 (citations omitted). "People of common intelligence" need not necessarily "guess at its meaning" or "differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). FACE gives "fair notice to those to whom [it] is directed." *Grayned*, 408 U.S. at 112. Moreover, many of its terms have already survived vagueness challenges in similar contexts. *See, e.g. Cameron*, 390 U.S. at 616 ("obstruct"; "interfere"; "unreasonably"); *United States v.*

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[31] As I noted earlier, given my analysis in Part 1A (i.e., that physical obstruction is not protected under the First Amendment), one could argue that I addressed the defendants' overbreadth argument in Part 1B.

Gilbert, 813 F.2d 1523 (9th Cir. 1987) ("force"; "threat of force"), *cert. denied*, 484 U.S. 860.

Finally, FACE does not violate RFRA. RFRA provides in relevant part as follows:

> Government may substantially burden a person's exercise of religion only if it demonstrates that the application of that burden to the person -- (1) is in furtherance of a compelling government interest and (2) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000bb-1(b). The defendants have not explicitly argued that limitations on the use of force, threats of force, or physical obstruction against those seeking reproductive health services "substantially burden[s]" their exercise of religion. Obviously, if it does not, FACE does not violate RFRA. If FACE does represent such a substantial burden, it nonetheless would not violate RFRA. As I noted above, FACE addresses governmental interests in preventing violence and ensuring access to reproductive health services. Those interests are compelling, and FACE is the least restrictive means of furthering them.

Based upon my analysis, I find that FACE is neither a content based restriction on speech nor a vague or overbroad statute. Accordingly, the defendants' motions to dismiss will be denied.

III

Having determined that the Freedom of Access to Clinic Entrances Act of 1994 passes constitutional muster, I will now address the balance of the defendants' motions.[32]

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[32] Attorney Thomas J. McClure, who represents defendant Marilyn Hatch, filed three motions: a motion for a bill of particulars, a motion for notice of intent to use evidence, and a motion for a jury trial. Attorney Eugene R. Pigatti, counsel for defendants James Daniel Soderna, Dale

A

Rule 7(f) of the Rules of Criminal Procedure governs bills of particulars:

> The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

To determine whether a bill of particulars is necessary, the court must look at "whether the government's indictment [or information] sufficiently apprises the defendant of the charges to enable him to prepare for trial." *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991) (citing *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982)), *cert. denied*, __ U.S. __, 112 S. Ct. 1701 (1992), and *cert. denied*, __ U.S. __, 112 S. Ct. 1940 (1992). A bill of particulars is not required when the information necessary to the defendant's defense can be obtained through "some other satisfactory form." *Id.* (citing Charles Alan Wright, *Federal Practice and Procedure* § 129, pp. 436-38 (1982)). Moreover, a defendant has no right to discover, through a bill of particulars, the evidentiary details of the government's case. *United States v. Glecier*, 923 F.2d 496, 501-02 (7th Cir.) (the Constitution and Rule 7(f) "do not require the government to reveal the details of how it plans to prove its case"), *cert. denied*, __ U.S. __, 112 S. Ct. 54 (1991).

Robin Pultz, and Colin Lester Hudson, only filed a motion for a bill of particulars and a motion for a jury trial. Defendant Ronald Dean Brock subsequently joined in Attorney Pigatti's motions. Defendant Michael Charles Suhy has not filed any motions on these matters.

In reviewing the motions, I have reveiwed all of the arguments made in both sets of briefs. This order disposes of both sets of motions.

In requesting a bill of particulars, the defendants argue that they need the following information in order to prepare for trial:

> --the name and address of the juvenile named in the affidavit in support of the criminal complaint;
>
> --a description of their actions that amounted to "physical obstruction" and "intimidation";
>
> --the names and addresses of people the defendants allegedly "interfered with" or "intimidated";
>
> --the names and addresses of the witnesses the government expects to call at trial.

The government objects to this request, arguing that its applicable "open file" policy obviates the need for a bill of particulars.

I agree with the government. The government's open files, along with Agent Gibson's affidavit, provide a satisfactory alternative to a bill of particulars. *See Canino*, 949 F.2d at 949. They provide the defendants with sufficient information to prepare their defense. For the most part, the defendants are seeking evidence, such as the witness list and the list of the targets of the defendants' intimidation and interference. As I discussed above, such discovery falls outside the scope of a bill of particulars. The defendants also request that the court order the government to list those actions that constitute "intimidation" and "interference," as charged in the information. Those actions are already sufficiently referenced in the government's information and Agent Gibson's affidavit, and, without a doubt, are sufficiently detailed in reports in the government's file. The defendants are not entitled to obtain, through a bill of particulars, the evidence the government intend to rely on to prove that those identified actions actually constituted "intimidation" or "obstruction" under FACE.

B.

The defendants' motion for notice of intent to use evidence will also be denied. Rule 12(d)(2) provides that

> the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief in trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

To the extent that the government's open files contain information that is subject to Rule 16 discovery, Rule 12(d)(2) creates a notice requirement. The open file policy does not, in and of itself, satisfy this notice requirement because it does not specify which evidence the government intends to use at trial. *See, e.g., United States v. Kelley*, 120 F.R.D. 103, 107 (E.D. Wis. 1988). In its brief opposing the defendants' motions, however, the government has stated that it "intends to use all the material discoverable under Rule 16, access to which has been or will be provided to defendant Hatch under its open-file policy, as evidence in chief at trial." Thus, the defendants' motion is moot; the government has provided notice of its intent to use *all* of the evidence in its open file that is subject to Rule 16.[33]

---

[33] Obviously, the government might not end up using all of the discoverable information in its files. At this time, however, the court has no reason to doubt the sincerity of the government's statement. Moreover, it is important to remember that the purpose of Rule 12(d)(2) is to give the defendants an opportunity to move to suppress evidence. The government's notice in this case simply alerts the defendants to the fact that they should look at all of the discoverable material in the open file in considering any motion to suppress.

C

The defendants have also moved for a jury trial. By its terms, the Sixth Amendment guarantees a jury trial "[i]n all criminal prosecutions."[34] The Supreme Court has held that this guarantee does not apply to "petty" crimes and offenses, however. *Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989).

To determine whether a crime is "petty" or "serious," the court must consider "objective indications of the seriousness with which society regards the offense." *Id.* at 541 (citations omitted). "The best indicator of society's views is the maximum penalty set by the legislature." *United States v. Nachtigal*, __ U.S. __, 113 S. Ct. 1072, 1073 (1993). The maximum period of incarceration provides the primary indicator; in fact, the Supreme Court has decided that offenses carrying maximum prison sentences of six months or less are presumptively "petty." *Blanton*, 489 U.S. at 543. An individual charged with a presumptively petty crime is entitled to a jury trial "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* The Supreme Court has repeatedly emphasized that the presumption will only be "punctured" in the rare case. *Nachtigal*, __ U.S. __, 113 S. Ct. at 1074; *Blanton*, 489 U.S. at 543.

In the instant case, the defendants face a maximum prison sentence of six months.[35] As result, their offenses are

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[34] The jury trial right is also based on Article III, Section 2 of the Constitution, which provides that "[t]he Trial of all crimes, except in cases of Impeachment, shall be by Jury . . ." For ease of reference, I refer throughout this order only to the Sixth Amendment right.

[35] The defendants argue that, because the information in this case does not explicitly charge them with a nonviolent physical obstruction, they are

presumptively "petty" for the purposes of the constitutional right to a jury trial. But they are also subject to a fine of not more than $10,000. The defendants argue that those additional fines are sufficiently onerous to overcome the six-month presumption. In support of that argument, they point to 18 U.S.C. § 19, which defines "petty" offenses as those misdemeanors for which the maximum sentence is no greater than six months and the maximum fine is no greater than $5,000. 18 U.S.C. § 19; 18 U.S.C. §§ 3571(b)(6) - (7), 3581. The defendants argue that § 19 represents a "legislative determination that the offense in question [any offense carrying maximum penalties exceeding six months incarceration and a $5,000 fine] is a 'serious' one." *Blanton,* 489 U.S. at 543. As a result, they argue, the FACE charges against the defendants involve "serious" offenses.

The defendants' argument is consistent with the approach taken in several circuit courts. *See, e.g., United States v. McAlister*, 630 F.2d 772, 774 (10th Cir. 1980); *United States v. Hamdan*, 552 F.2d 276, 280 (9th Cir. 1977); and *Douglass v. First National Realty Corp.*, 543 F.2d 894, 902 (D.C. Cir. 1976) (all using the former 18 U.S.C. § 1(3), a provision defining "petty offenses"). Moreover, the Supreme Court has, at times, "looked to the federal classification scheme in determining when a jury trial must be provided." *Blanton,* 489 U.S. at 545 n.11.

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subject to the penalties for violent violations of FACE (up to one year in prison and a $100,000 fine).

I disagree. As I discussed above, *supra* note 3, although it did not specify as much in the information charging the defendants, the government has made it very clear that it is charging the defendants with *nonviolent physical obstruction.* I plan to treat this case as a nonviolent physical obstruction case. FACE sets out specific penalties for nonviolent, as opposed to violent, physical obstruction. Those penalties are the relevant penalties for Sixth Amendment purposes.

At times, however, the Supreme Court and, more recently, the Seventh Circuit, have discouraged excessive emphasis on the federal classifications. *Muniz v. Hoffman,* 422 U.S. 454, 477 (1975) ("[b]ut in referring to [Congress' definition of "petty crimes."] . . . the Court accorded it no talismanic significant . . ."); *In re Betts,* 927 F.2d 983, 986 (7th Cir. 1991); *United States v. Kozel*, 908 F.2d 205, 206-07 (7th Cir. 1990) ("Section 19 neither expands nor limits a defendant's statutory right to a jury trial for criminal contempt and may inform but does not control interpretation of the jury clauses in Article III and the Sixth Amendment."), *cert. denied*, 498 U.S. 1089 (1991); *cf. Nachtigal,* __ U.S. __, 113 S. Ct. at 1074 (no mention of Congressional classification; $5,000 fine not sufficient to "puncture" the six month incarceration presumption).

Ultimately, there are several reasons why I am not persuaded that the $10,000 fine provision in FACE is sufficiently severe to overcome the *Blanton* presumption. First, the Supreme Court has repeatedly emphasized that the presumption will only be punctured in the rare case. *See, e.g., Nachtigal,* __ U.S. __, 113 S. Ct. at 1074; *Blanton*, 489 U.S. at 543. Second, several recent cases suggest a trend of strict application of the presumption. *See Nachtigal,* __ U.S. __, 113 S. Ct. at 1074 (rejecting a jury trial claim for prosecution under a statute that provided for incarceration up to six months and a fine of not more than $5,000 as a "relatively routine application of the rule announced in *Blanton*"); *United States v. LaValley*, 957 F.2d 1309, 1312 (6th Cir.) (summary rejection of jury trial claim for offense carrying maximum penalties of six months in jail, a $5,000 fine, and a five year term of supervised release), *cert. denied*, __ U.S. __, 113 S. Ct. 460 (1992). Finally, as the government points out, the differential penalty structure in FACE[36] provides evidence of a "legislative determination that

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[36] Penalties for nonviolent obstruction are limited to a maximum of six months in jail and a $10,000 fine; all other offenders are subject to at least one year in jail and a fine of not more than $100,000.

the offense" of nonviolent physical obstruction is *not* a "serious one." *Blanton*, 489 U.S. at 543.

I recognize that "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter." *Baldwin v. New York*, 399 U.S. 66, 73 (1970). The Supreme Court has determined, however, that, in almost all cases involving offenses punishable by up to six months incarceration, the disadvantages of imposing such punishment without a jury are "outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." *Blanton*, 489 U.S. at 543 (citing *Baldwin*, 399 U.S. at 73). This prosecution is just such a case.

CONCLUSION

For all of the foregoing reasons, FACE is not unconstitutional, and the defendants are not entitled to a bill of particulars, notice of intent to use evidence, or a jury trial. Accordingly,

IT IS ORDERED that the defendants' motions to dismiss be and the same are hereby **DENIED;**

IT IS FURTHER ORDERED that the defendants' motions for bills of particulars be and the same are hereby **DENIED;**

IT IS FURTHER ORDERED that defendant Hatch's motion for notice of intent to use evidence be and the same is hereby **DENIED** as moot; and

IT IS FURTHER ORDERED that the defendants' motions for trial by jury be and the same are hereby **DENIED.**

Dated at Milwaukee, Wisconsin this 23rd day of September, 1994.

BY THE COURT:

/s/ J.P. Stadtmueller
J.P. Stadtmuellller
U.S. District Judge

APPENDIX C

FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994

SECTION 1. SHORT TITLE.

This Act may be cited as the "Freedom of Access to Clinic Entrances Act of 1994."

SEC. 2. PURPOSE.

Pursuant to the affirmative power of Congress to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution, it is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

SEC. 3. FREEDOM OF ACCESS TO CLINIC ENTRANCES.

Chapter 13 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"Sec. 248 Freedom of Access to Clinic Entrances.

(a) Prohibited Activities - Whoever -

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services,

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to in-

jure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship.

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. - Whoever violates this section shall

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding Section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10

years, and if death results, it shall be for any term of years or for life.

(c) Civil Remedies. -

(1) Right of action. -

(A) In general. - Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgement, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States.--

(A) In general. - If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may

commence a civil action in any appropriate United States District Court.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent -

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General. -

(A) In general. - If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District court.

(B) Relief. - In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of Construction. - Nothing in this section shall be construed -

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful

demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interferences;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. - As used in this section:

(1) Facility. - The term 'facility' includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. - The term 'interfere with' means to restrict a person's freedom of movement.

(3) Intimidate. - The term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. - The term 'physical obstruction' means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. - The term 'reproductive health services' means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. - The term 'State' includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States."

SEC. 4. CLERICAL AMENDMENT.

The table of sections at the beginning of chapter 13 of title 18, United States Code, is amended by adding at the end the following new item:

"248. Blocking access to reproductive health services."

SEC. 5. SEVERABILITY

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any other person or circumstance shall not be affected thereby.

SEC. 6. EFFECTIVE DATE

This Act takes effect on the date of the enactment of this Act, and shall apply only with respect to conduct occurring on or after such date.

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

No. 96-141

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARILYN R. HATCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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34 pp

QUESTIONS PRESENTED

1. Whether petitioner was constitutionally entitled to have a jury at her trial on a charge that carried a maximum penalty of six months in jail and a $10,000 fine.

2. Whether the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248, violates the free speech clause of the First Amendment.

3. Whether Congress lacked authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 82 F.3d 1370. The district court's opinion (Pet. App. B1-B37) is reported at 863 F. Supp. 851.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 30, 1996. The petition for a writ of certiorari was filed on July 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-259, 108 Stat. 694, 18 U.S.C. 248, in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. From 1977 through April 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.); H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993) (H.R. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. S. Rep. 3, 6; H.R. Rep. 6-7; H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994) (H.R. Conf. Rep.). This violence endangered the lives of, and inflicted injuries on, physicians, clinic staff, and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. S. Rep. 5.

Groups opposed to abortion organized blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. 7. From 1977 through April 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7. Providers of abortions also received numerous death threats. S. Rep. 10.

Violence and blockades aimed at abortion providers and facilities have occurred in at least 28 States, the District of Columbia, and dozens of cities across the country. S. Rep. 12. Many of these activities have

been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. Many patients who seek abortion services travel across state lines to obtain services, and clinic employees sometimes travel across state lines to work. *Ibid.*

The declared purpose and the effect of the violent and obstructive activities have been to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and by closing clinics. *Id.* at 11, 17. The evidence before Congress demonstrated that the campaign to eliminate abortion services through violence and obstruction was succeeding and had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Congress found that the violent and obstructive conduct burdens interstate commerce by

> interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

H.R. Conf. Rep. 7; see also S. Rep. 14, 17, 31-32. Congress also found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. *Id.* at 19-21; H.R. Rep. 6, 10.

The Act provides for civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction,[1] intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
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> * * * * *
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> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services * * *.

18 U.S.C. 248(a). The Act specifies, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. 248(d)(1).

2. *Factual Background*

a. In the early morning hours of June 4, 1994, petitioner and five co-defendants physically blockaded the two entrances to a reproductive health services clinic in Milwaukee, Wisconsin. Pet. App. A2, B4. Peti-

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[1] The Access Act defines "physical obstruction," in relevant part, as "rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4).

tioner, a co-defendant, and a juvenile sat in the recessed alcove of one of the clinic entrances, blocking the door with their bodies and with a fifty-five gallon drum filled with concrete and steel. *Id.* at A2-A3, B5. Two other defendants were attached by handcuffs, welding, and other means to a disabled automobile that had been placed on the sidewalk directly in front of the alcove, blocking access to the clinic. *Id.* at A2-A3, B5. Two other defendants were similarly fastened to a second automobile that blocked another entrance to the clinic. *Id.* at A3, B4-B5. Petitioner and her co-defendants refused to move away from the clinic entrances when ordered to do so by police. *Id.* at B5. Clinic staff members could not enter the clinic when they arrived at work that morning. *Ibid.* It took the fire department several hours to dismantle the cars, extricate petitioner and her co-defendants, and clear the entrances to the clinic. *Id.* at A3. During much of the period in which the fire department was working to clear the entrances, many patients with appointments to have abortions or consultations could not be served. *Id.* at A3, B6.

Petitioner and her co-defendants were charged by information with violation of the Access Act, 18 U.S.C. 248(a)(1), by using physical obstruction to intentionally interfere with and intimidate persons because those persons were obtaining or providing reproductive health services and in order to intimidate those person from obtaining or providing such services. Pet. App. B4, B6. Because they were charged with a first offense of only nonviolent physical obstruction, petitioner and each of her co-defendants faced a maximum penalty of six months' imprisonment and a fine of not more than $10,000. *Id.* at A3, B7 & n.4, B33-B34 & n.35; 18 U.S.C. 248(b).

Petitioner moved to dismiss the charges on various grounds, contending, *inter alia*, that the Access Act violated the First Amendment. Pet. App. B8. She also filed certain pretrial motions, as an alternative, including a request for a trial by jury. *Ibid.* The district court denied the motions. *Id.* at B8-B29, B33-B36. After a bench trial, the district court found petitioner guilty as charged. *Id.* at A3. The court sentenced petitioner to 30 days' incarceration, and ordered her to pay $500 as a fine and $158 in restitution. Pet. C.A. Br. App. A2-A5.

b. The court of appeals affirmed, Pet. App. A1-A16, emphasizing that the Access Act already has survived constitutional challenges in three other circuits similar to those raised by petitioner. *Id.* at A1, citing *United States* v. *Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), petition for cert. pending, No. 96-5615; *Cheffer* v. *Reno*, 55 F.3d 1517 (11th Cir. 1995); *American Life League, Inc.* v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995). In an opinion by Chief Judge Posner, the court held that Congress had authority under the Commerce Clause to enact the Access Act. Pet. App. A3-A4, A16. The court reaffirmed its decision in *United States* v. *Wilson*, 73 F.3d 675 (1995), cert. denied, Nos. 95-1523, 95-1883, 95-8995, 95-9041, 95-9081 (Oct. 7, 1996) (65 U.S.L.W. 3256), in which it had held that the Act is a valid exercise of congressional authority because the Act regulates activity that substantially affects interstate commerce. Citing the Senate Report that accompanied the legislation, the court below found that the Access Act "is a statute that really does seek to remove a significant obstruction, in rather a literal sense, to the free movement of persons and goods across state lines." Pet. App. A3-A4.

The court of appeals also rejected petitioner's claim that the Access Act violates the First Amendment. Pet. App. A5-A11, A16. The court concluded that obstruction of a clinic's entrances is conduct that goes beyond protest, invades property rights, and is not protected by the First Amendment. *Id.* at A7. The court also held that the Act does not impermissibly single out abortion clinics for special protection, does not have the purpose or effect of suppressing a particular viewpoint, and is not impermissibly vague. *Id.* at A5, A8-A11.

Finally, the court of appeals held that petitioner did not have a constitutional right to a jury trial on the charge against her. Pet. App. A11-A16. The court explained that the constitutional right to a trial by jury applies only to offenses that are deemed "serious" offenses, as opposed to "petty" offenses. The court held that, because the maximum prison term that petitioner could have received for the offense charged was six months, the offense was presumptively a petty offense that does not give rise to a constitutional right to a trial by jury. *Id.* at A12-A13, A16. The court of appeals emphasized that this Court "has made clear in a brace of recent unanimous opinions that where the maximum prison term is six months there is almost never going to be a constitutional right to trial by jury even if fines or other supplementary sanctions increase the net severity of punishment well beyond that of the prison term standing by itself." *Id.* at A12-A14, discussing *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 543 (1989), and *United States* v. *Nachtigal*, 507 U.S. 1, 3 (1993) (per curiam). The court concluded that the potential $10,000 fine in this case did not serve to overcome the presumption that the violation was a petty offense

because such a fine was not so onerous "as to make *clear* that Congress considered a first-time blockade of an abortion clinic a serious offense." *Id.* at A13. The court also specifically rejected the argument that petitioner had a right to a jury trial because the potential $10,000 fine she faced exceeded the amount included by Congress in its definition of the term "petty offense." Congress defines that term to include, *inter alia*, certain misdemeanors if the term of imprisonment does not exceed six months and the maximum fine for an individual does not exceed $5,000. *Id.* at A14.[2] The court held that the statutory definition "does not determine whether an offense is petty in the constitutional sense." *Ibid.*, citing *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). The court concluded that petitioner and her co-defendants were

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[2] Section 19 of Title 18 provides, in relevant part:

> As used in this title, the term "petty offense" means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization.

18 U.S.C. 19.

Section 3571(b) provides, in relevant part, that:

> [A]n individual who has been found guilty of an offense may be fined not more than the greatest of—
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> (1) the amount specified in the law setting forth the offense;
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> * * * * *
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> (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or
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> (7) for an infraction, not more than $5,000.

18 U.S.C. 2571(b).

"not entitled to have a jury consider the charges against them, because their offense was 'petty' in the sense that the Supreme Court has given the word and was therefore beyond the scope of the constitutional guaranty of trial by jury for federal crimes." Pet. App. A16.

Judge Kanne dissented in part, concluding that the $10,000 fine demonstrated that the offense was "serious" and thus subject to the constitutional right to a trial by jury. Pet. App. A16-A32.

ARGUMENT

1. a. Petitioner contends (Pet. 8-12) that she had a constitutional right to be tried by a jury on the charge against her. The court of appeals correctly held, however, that petitioner had no such right because the offense for which she stood trial constitutes a petty offense for constitutional purposes.

The constitutional guarantee of a jury trial in criminal cases applies only to "serious" offenses, and not to "petty" offenses. *Lewis* v. *United States*, 116 S. Ct. 2163, 2166 (1996); *Callan* v. *Wilson*, 127 U.S. 540, 541 (1888). Whether a particular offense is "serious" or "petty" depends on "objective indications of the seriousness with which society regards the offense." *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 543 (1989). The Court has held that the "best indicator of society's views is the maximum penalty set by the legislature." *United States* v. *Nachtigal*, 507 U.S. 1, 3 (1993) (per curiam).

An offense for which the legislature has authorized a maximum prison term of no more than six months is presumed to be a petty offense. *Nachtigal*, 507 U.S. at 3; *Blanton*, 489 U.S. at 543. To overcome that presumption, a defendant must demonstrate "that any

additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Ibid.* Additional penalties overcome the presumption of a petty offense only in "rare" cases. *Nachtigal*, 507 U.S. at 4. Moreover, fines will seldom be onerous enough to overcome the presumption because "they cannot approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 U.S. at 542.

Petitioner concedes (Pet. 8-9) that the offense for which she stood trial is presumed to be a petty offense because the maximum term of imprisonment authorized for such a first-time violation of Section 248(a)(1) by nonviolent obstruction is six months. The court of appeals correctly held that petitioner failed to overcome that presumption. The structure and history of the Access Act's penalty provisions do not reflect the necessary legislative determination that the violation with which petitioner was charged constitutes a serious, as opposed to a petty, offense. *Ibid.* To the contrary, they reflect a determination that a first violation committed by nonviolent physical obstruction is a substantially less significant offense than all other violations of the Act, including other misdemeanors that carry longer sentences.

In establishing the criminal penalties authorized for violations of the Access Act, Congress provided that, generally, for a first offense, the maximum term of imprisonment authorized is one year. 18 U.S.C. 248(b)(1), 3559(a)(6). The maximum term of imprisonment generally authorized for a second or subsequent violation of the Act is three years. 18 U.S.C. 248(b)(2). In both instances, the defendant also may

"be fined in accordance with [Title 18]," which authorizes a fine up to $100,000 in the first instance, and up to $250,000 in the case of felonies. See 18 U.S.C. 248(b)(1) and (b)(2); 3559(a)(5) and (a)(6); 3571(b)(3) and (b)(5).

Congress created two exceptions to the Access Act's generally applicable penalties, however. The two exceptions address the offenses that fall at the two extremes of the spectrum when Section 248(a) violations are ranked according to the violence involved. One exception applies to offenses at the most violent extreme—cases in which bodily injury or death results. That exception authorizes a term of imprisonment of up to 10 years in the former instance, and a term of imprisonment "for any term of years or for life" in the latter. 18 U.S.C. 248(b).

The other exception applies to offenses at the least violent extreme—cases such as petitioner's that "involv[e] exclusively a nonviolent physical obstruction." 18 U.S.C. 248(b). The exception authorizes a sentence of imprisonment of "not more than six months" and/or a fine of not more than $10,000, for a first offense, and a sentence of imprisonment of up to 18 months and/or a fine of not more than $25,000, for a subsequent offense. 18 U.S.C. 248(b). The penalty structure thereby sets nonviolent first offenses such as petitioner's apart from all other violations, including other misdemeanors. Whereas first offenses that are committed by nonviolent physical obstruction carry a maximum term of imprisonment of six months, all other misdemeanors under the Act can result in a maximum prison term of up to one year. These distinctions undermine any contention that there was a congressional determination that a first offense committed by nonviolent physical obstruction

constitutes a "serious" offense, as a constitutional matter, within the meaning of this Court's precedents.

The legislative history of the Access Act confirms that Congress did not intend that a first-time, nonviolent obstruction of a clinic entrance in violation of Section 248(a) constitute a serious criminal offense. In earlier versions of the bill that ultimately became the Access Act, the penalty provisions authorized the same punishment for offenses involving nonviolent physical obstruction as for offenses involving force or threat of force (unless the offense resulted in bodily injury or death). See 139 Cong. Rec. S15,655-S15,658 (daily ed. Nov. 16, 1993). Congress specifically amended the legislation, however, to dramatically lower the punishment for nonviolent violations. See *Id.* at S15,665-S15,676. The amendment reduced the maximum prison term for a nonviolent violation by half and cut the maximum fine by 90% to differentiate a violation committed by nonviolent physical obstruction as a substantially less significant offense than a serious violation that involved violent, threatening, or destructive conduct. 140 Cong. Rec. S5596 (daily ed. May 12, 1994). In reducing the punishment for nonviolent physical obstruction, Congress also maintained its distinction of first violations as less serious offenses than second or subsequent violations. Congress established that a first violation by nonviolent obstruction is the least serious violation—a misdemeanor that carries a maximum imprisonment term of six months; a second or subsequent violation by nonviolent obstruction is a felony that carries a maximum imprisonment term of 18 months. See *id.* at S15,675; 18 U.S.C. 248(b).

b. The court of appeals correctly rejected petitioner's argument (Pet. 9, 11) that, because the possible statutory fine exceeded the amount classified in 18 U.S.C. 19 as a petty offense, petitioner's violation must be considered a serious offense for constitutional purposes. Reliance on the statutory definition to define "petty offense" for constitutional purposes would be inconsistent with the Court's admonition that the presumption that an offense is a petty offense can be overcome only in "rare" cases, *Nachtigal*, 507 U.S. at 5; there would be no need to adopt such a heavy presumption if the statutory definition of "petty offense" were controlling.

Petitioner's argument is contrary to the Court's opinion in *Muniz* v. *Hoffman*, 422 U.S. 454 (1975). Emphasizing that the statutory definition of "petty offense" has no "talismanic significance," the Court in *Muniz* rejected the argument that a defendant has a right to a jury trial whenever a fine exceeds the dollar limit prescribed by the statutory definition. *Id.* at 477. Moreover, as the court of appeals noted, the fine imposed on the defendant union in *Muniz*, which was "held not to entitle the defendant to a jury trial, exceeded the then maximum fine for a Title 18 'petty offense' by a factor of twenty—$10,000, as here, but worth a lot more than twenty years ago, versus $500." Pet. App. A14.

The Court subsequently reaffirmed the *Muniz* ruling that the authorized term of imprisonment, rather than the authorized fine or other punishment, "is the most powerful indication of whether an offense is 'serious.'" *Blanton*, 489 U.S. at 542. Although the Court stopped short of holding that an offense carrying a maximum term of six months' imprisonment must always be considered a petty offense, the

Court went so far as to find it "appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'" *Id.* at 543. The Court emphasized that, under this approach, a jury trial will be available only "in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line.'" *Ibid.* Finally, in *Nachtigal*, the Court made clear that the *Blanton* presumption, that a maximum term of imprisonment of six months signifies a petty offense, could not be overcome even by a possible five-year term of probation spent in a community correctional facility, and/or a $5,000 fine. *Nachtigal* similarly discounted such punishments as unable to "approximate in severity the loss of liberty that a prison term entails." 507 U.S. at 4, quoting *Blanton*, 489 U.S. at 542. As the court of appeals put it, "[s]o confident was the Court that the punishment authorized by the statute involved in *Nachtigal* did not cross the line from petty to serious that it reversed the court of appeals unanimously on the certiorari papers, without calling for briefs or hearing oral argument." Pet. App. A14.

c. Petitioner contends (Pet. 9-11) that the court of appeals' ruling conflicts with decisions of other circuits that have relied on the statutory definition of "petty offense" to determine whether a defendant has a constitutional right to a jury trial. The alleged conflict does not warrant review by this Court.

In several of the cases cited by petitioner, the courts did not expressly hold that the statutory definition controls the jury trial issue. For example, in *Girard* v. *Goins*, 575 F.2d 160 (1978), the Eighth Circuit held that individuals who had received

contempt fines ranging from $2,500 to $10,000 were entitled to a jury trial, but the court refused to hold that a jury trial was required whenever a fine exceeded the limit set forth in the statutory definition of "petty offense." *Id.* at 165. In *United States* v. *PATCO*, 678 F.2d 1, 5 (1982), the First Circuit held that a $5,000 contempt fine was "serious" and triggered the right to a jury trial, but it did not cite the statutory definition of "petty offense" in reaching that result. In *United States* v. *Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982), the court merely noted that other circuits had relied on the statutory definition of "petty offense" to determine whether fines imposed on individuals triggered the right to a jury trial. *Id.* at 936-937 & n.2. Moreover, all but one of the cases cited by petitioner were decided prior to the Court's adoption, in *Blanton*, of the presumption that a maximum six-month imprisonment term signifies a petty offense.[3] There is no basis for believing that the courts would necessarily find the statutory definition of "petty offense" dispositive if they were to revisit the issue in light of *Blanton* and *Nachtigal*. Review by this Court of the issue therefore would be premature at the present time.

In the one case cited by petitioner that was decided after *Blanton*, the court of appeals did not decide or discuss whether a fine exceeding the limit in the statutory definition of "petty offense" would auto-

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[3] See *Douglass* v. *First National Realty Corp.*, 543 F.2d 894, 902 (D.C. Cir. 1976) (holding that $500 figure in the now-repealed definition in 18 U.S.C. 1(3) was the dividing line between petty and serious offenses for individuals); *United States* v. *McAlister*, 630 F.2d 772, 774 (10th Cir. 1980) (same); *United States* v. *Hamdan*, 552 F.2d 276, 278, 280 (9th Cir. 1977) (same).

matically trigger the constitutional right to a jury trial. See *United States* v. *Time*, 21 F.3d 635 (5th Cir. 1994). In that case, the defendants argued that they had a right to a jury trial, even though their contempt fines did not exceed $5,000, and the court of appeals rejected that argument, noting that 18 U.S.C. 19 defines "petty offense" to encompass violations punishable by fines up to $5,000. 21 F.3d at 642. Moreover, an *en banc* opinion of that circuit suggests that, when faced with a case similar to petitioner's, the court would properly focus primarily on the term of incarceration—not the level of a fine—to distinguish petty and serious offenses; in *Landry* v. *Hoepfner*, 840 F.2d 1201, 1216 n.30 (1988) (*en banc*), cert. denied, 489 U.S. 1083 (1989), the court strongly suggested that a fine exceeding the limit in the statutory definition of "petty offense" would not trigger the constitutional right to a jury trial.

2. Petitioner contends (Pet. 12-17) that the Access Act is a content-based and viewpoint-based restriction on speech that violates the First Amendment. Petitioner's arguments are substantially similar to those raised by petitioners in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 648 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995), and in *Woodall* v. *Reno*, 47 F.3d 656, 657 (4th Cir.), cert. denied, 115 S. Ct. 2755 (1995). The Court should deny review in the present case for the same reasons it denied review in those cases. The court of appeals' holding is correct and does not conflict with the decisions of this Court or any other court of appeals.[4]

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[4] Two other courts of appeals have rejected similar First Amendment challenges to the Access Act. See *United States* v. *Dinwiddie*, 76 F.3d 913, 921-924 (8th Cir. 1996), petition for

a. The Access Act regulates conduct, not speech. The Act does not prohibit speech—even speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortion. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. As this Court has made clear, such conduct is outside the scope of First Amendment protections. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to building); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute forbidding unreasonable interference with access to buildings). Congress may proscribe such activities, even when they are designed to communicate a message, because they "produce special harms distinct from their communicative impact." *Mitchell*, 508 U.S. at 484-485.[5]

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cert. pending, No. 96-5615; *Cheffer* v. *Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995).

[5] Petitioner contends (Pet. 7, 12-13) that the Access Act should be scrutinized as a regulation of expressive conduct according to the approach followed by the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965). In *Cox*, the Court reversed a conviction for violation of a state law prohibiting obstruction of public passages. The Court did so because the statute gave officials unbridled discretion to allow obstructive demonstrations with which they agreed, and to forbid those they opposed. *Id.* at 555-558. No such problem exists under the Access Act, which forbids all physical obstruction of clinics that is designed

Petitioner concedes (Pet. 12) that physical obstruction and use of force are unprotected by the First Amendment. She nonetheless contends that the Access Act violates the First Amendment because, in petitioner's view (Pet. 12-17), it singles out for punishment only conduct that expresses certain messages against abortion. Contrary to petitioner's assertion, the Access Act is content-neutral and viewpoint-neutral because it "serves purposes unrelated to the content of expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The Act is justified, not by reference to the content of any expression it may incidentally affect, but by the needs to protect interstate commercial transactions, to protect women who seek to exercise their constitutional right to reproductive choice, and to maintain public safety and order. Pub. L. No. 103-259, § 2 (Purposes). Those interests are unrelated to any expressive content the forbidden conduct may have. Nor does the Access Act proscribe conduct with reference to its expressive conduct, if any. The Act permits the expression of any message, including a message of hostility to abortion.

Petitioner argues (Pet. 14-16), however, that the Access Act is a content-based regulation because it proscribes certain activity only when the defendant directs such conduct at another person "because" he or she is seeking to obtain or provide reproductive health services. 18 U.S.C. 248(a)(1). This requirement concerns the motive of a violator, not the

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to interfere with persons because they are providing or obtaining reproductive health services—regardless of whether the public authorities agree or disagree with the views of those causing the obstruction.

message the person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Mitchell*, 508 U.S. at 487-488. And, contrary to petitioner's contention (Pet. 14-15), the Access Act is consistent with *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992). "[W]hereas the ordinance struck down in *R.A.V.* was explicitly directed at expression * * *, the statute in this case is aimed at conduct unprotected by the First Amendment." *Mitchell*, 508 U.S. at 487.

The Access Act does not target persons because they have an anti-abortion viewpoint. The Act does not limit its protection to "abortion clinics"; rather, it prohibits interference with persons because they are providing or obtaining "services relating to pregnancy," including counselling that an anti-abortion group might give to a pregnant woman to urge her *not* to have an abortion, and medical care to assist women in carrying their pregnancies to term. 18 U.S.C. 248(e)(5). The Act targets intentional interference with any reproductive health service, regardless of whether the perpetrator's views are anti-abortion or pro-choice. The use of force or physical obstruction to blockade a facility providing such services violates the Act to the same extent as a blockade of a facility offering abortion services.[6] For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular

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[6] See Pet. App. B18 n.19. Indeed, in *United States* v. *Mathison*, No. 95-CR-85 (E.D. Wash. 1995), the government charged the defendant with violating the Access Act by threatening to injure persons who provide anti-abortion counseling.

abortion; the use of force or obstruction to achieve this end would violate the Act. –

b. Even if the conduct regulated by the Access Act had sufficient expressive content to implicate the First Amendment, it would easily withstand scrutiny under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (1) serves substantial governmental interests, (2) restricts conduct for reasons unrelated to its expressive content, and (3) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves substantial and legitimate governmental interests: protecting interstate commercial transactions, preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. And, as we have explained above, those interests are unrelated to any expressive content the forbidden conduct may have.

The fact that, in practice, the majority of persons who wish to engage in conduct that would violate the Access Act may be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility to the Vietnam war. The law was nonetheless held constitutional because it proscribed conduct without regard to any intended or unintended message. The

Access Act similarly proscribes obstructive, threatening, or violent conduct, without regard to the viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. It is carefully drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care.[7] The Act does not restrict the ability of abortion opponents to communicate with their desired audience. The statute permits speech, signs, prayers, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered facilities and regardless of the content of the speech. *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 648 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995).

This Court's decision in *Madsen*, *supra*, supports the Act's constitutionality. In *Madsen*, a state court enjoined certain anti-abortion activists who had engaged in specific protests outside a women's health clinic from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act: (1) interfering with access to, ingress into, and egress

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[7] The Act defines "interfere with" to mean "to restrict a person's freedom of movement." 18 U.S.C. 248(e)(2). "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. 248(e)(3). "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services * * *, or rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4).

from a women's health clinic; and (2) physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic, and harassing, intimidating or threatening any employee of the clinic. See 114 S. Ct. at 2522. The Court upheld these aspects of the injunction, concluding that these restrictions were content-neutral, that they were unrelated to the defendants' message, and that any effect on expression was incidental to the government's regulation of threatening conduct. *Id.* at 2524.

Finally, petitioner suggests (Pet. 17) that she was punished merely because of the anti-abortion message on a sign she was holding. But, the evidence (a videotape, Pet. App. A15) shows that she physically blocked the clinic entrance with her body and refused to move when the police ordered her to do so. Such conduct is not protected by the First Amendment, and the Access Act was constitutionally applied in this case.

3. Petitioner contends (Pet. 17-20) that Congress lacked authority under the Commerce Clause to enact the Access Act. She argues that the Act is invalid under *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), because the activity it prohibits does not substantially affect interstate commerce. Her contention is substantially similar to arguments raised by petitioners in *American Life League, Inc.* v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995), and in *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, Nos. 95-1523, 95-1883, 95-8995, 95-9041, 95-9081 (Oct. 7, 1996) (65 U.S.L.W. 3256). The Court should deny review in the present case for the same reasons it denied review in those cases. The

court of appeals' decision is correct and does not warrant further review by this Court.[8]

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 115 S. Ct. at 1629-1630. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 1629. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities that substantially affect interstate commerce." *Id.* at 1629-1630.

The court of appeals correctly held that the Act is a valid exercise of Congress's power to regulate "ac-

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[8] Two other courts of appeals have held that the Access Act is a valid exercise of Congress's Commerce Clause powers. See *Dinwiddie*, 76 F.3d at 919-921; *Cheffer*, 55 F.3d at 1519-1521.

District courts in the Second, Fifth, Ninth and Tenth Circuits have reached the same conclusion. See *United States* v. *Scott*, 919 F. Supp. 76 (D. Conn. 1996); *United States* v. *Bird*, Crim. No. H-95-071 (S.D. Tex. June 6, 1995), appeal pending, No. 95-20792 (5th Cir.); *Cook* v. *Reno*, 859 F. Supp. 1008, 1011 & n.2 (W.D. La. 1994); *United States* v. *White*, 893 F. Supp. 1423 (C.D. Cal. 1995); *Riely* v. *Reno*, 860 F. Supp. 693, 707-708 (D. Ariz. 1994); *Council for Life Coalition* v. *Reno*, 856 F. Supp. 1422, 1430-1431 (S.D. Cal. 1994); *United States* v. *Lucero*, 895 F. Supp. 1421, 1423-1424 (D. Kan. 1995).

We are aware of only one, as-yet unreviewed, district court that has held that Congress lacked authority under the Commerce Clause to enact the Access Act. See *Hoffman* v. *Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), appeal pending, Nos. 96-1581, 96-1582, 96-1623 (4th Cir.). That district court decision conflicts with binding precedent of its own circuit, see *American Life League*, *supra*, and does not create a conflict calling for this Court's review.

tivities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630.[9] Congress is empowered to regulate conduct that "substantially affects" interstate commerce when considered in the aggregate. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (emphasis omitted) (upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one opthamologist affects interstate commerce).

Congress had a rational basis for concluding that the violent and obstructive activities prohibited by the Access Act "substantially affect interstate commerce" by their adverse impact on clinics and other providers of reproductive health services who are involved in interstate commerce:

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[9] The Access Act also constitutes a proper exercise of Congress's power, under the Commerce Clause, to regulate or protect "persons or things in interstate commerce," *Lopez*, 115 S. Ct. at 1629, as the court of appeals suggested. Pet. App. A4 (finding that the Access Act was designed to promote "the free movement of persons and goods across state lines"). Many patients who seek reproductive health services travel from one State to another to obtain services, clinic doctors and employees often travel across state lines to work, and clinics often acquire supplies from other States. See S. Rep. 31 The United States also maintains that the Access Act is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. Because the court of appeals did not reach that question, however, it is not before the Court.

> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. 31. Also, many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another," "[c]linic employees sometimes travel across State lines to work as well," and "some doctors who perform abortions work in facilities in more than one State." *Ibid.*

The violent and obstructive conduct proscribed by the Access Act substantially interferes with such interstate commerce. Such conduct disrupts the sale of services and goods, the employment of personnel and generation of income, the purchase and lease of facilities and equipment, and the purchase of medicine and supplies from other States. H.R. Conf. Rep. 7; S. Rep. 14, 17, 31; H.R. Rep. 8-9. Activity prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, and threatened to eradicate those commercial services from the national market. S. Rep. 3, 5, 17, 31; H.R. Rep. 8. Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial aggregate effect on interstate commerce. See, *e.g.*, *Katzenbach* v.

McClung, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of racial discrimination supported Congress's conclusion that it substantially affected interstate commerce).

Nothing in *Lopez* calls into question the court of appeals' holding. The Court in *Lopez* struck down the provision of the Gun Free School Zones Act that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S. Ct. at 1630-1631; *id.* at 1640 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that the possession of an otherwise lawful firearm in a school zone bears such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce. *Id.* at 1632, 1634. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. *Id.* at 1631.

The Access Act differs markedly from the Gun Free School Zones Act. The Access Act "by its terms" directly addresses "commerce" and "economic enterprise[s]." *Lopez*, 115 S. Ct. at 1630-1631. It prohibits interference with commercial enterprises and with persons because they are engaging in commerce (*i.e.*, providing or obtaining the commercial service of reproductive health care). Unlike in *Lopez*, where neither the prohibited conduct (possession of a gun near schools) nor its immediate effect (increased potential for violence in schools) was commercial, here, the immediate effect of the prohibited conduct is

obstruction of commercial transactions. In addition, in contrast to *Lopez*, the effect of physical obstruction of reproductive health service facilities on interstate commerce is direct: it interferes with persons, things, and the provision of services in interstate commerce and threatens in the aggregate to eliminate abortion services from the national commerce. S. Rep. 3. Also, the Access Act, unlike the Gun Free School Zones Act as originally adopted, is supported by a legislative record containing abundant evidence and specific findings by Congress showing that the proscribed conduct substantially impedes interstate commerce—findings to which the courts must defer. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

Petitioner nonetheless contends (Pet. 19) that Congress lacked authority to enact the Access Act because the conduct prohibited by the statute is not itself commercial. She suggests that where the prohibited conduct is not a commercial transaction, a statute will be invalid unless it contains a jurisdictional element requiring proof that an individual defendant's conduct affected interstate commerce. The Court reaffirmed in *Lopez*, however, that Congress's commerce power extends to activities that *either* "arise out of *or* are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 115 S. Ct. at 1631 (emphasis added). Indeed, nothing in that decision questions the power of Congress to prohibit the use, as distinguished from the mere possession, of firearms in certain situations. Here, the conduct proscribed by the Act is undoubtedly "connected with a commercial transaction" because it interferes with persons who are providing or obtaining a particular

commercial service (*i.e.*, reproductive health care). Thus, the Access Act is within the commerce power and need not require proof in every case that a particular defendant's conduct affected interstate commerce. See *id.* at 1631.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 96-141

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARILYN R. HATCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to Rule 15.8 of the Rules of the Court, the Solicitor General respectfully files this supplemental brief to bring to the Court's attention the opinion in *United States* v. *Unterburger*, No. 95-5199, 1996 WL 577591 (11th Cir. Oct. 23, 1996).

One of the questions presented in the instant case is whether petitioner was constitutionally entitled to have a jury at her trial on a charge that carried a maximum penalty of six months in jail and a $10,000 fine. In our brief in opposition, we pointed out that the asserted conflict in the courts of appeals on that issue did not warrant review by the Court because all but one of the cases cited by petitioner were decided

prior to the Court's adoption, in *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 543 (1989), of the presumption that a maximum six-month imprisonment term signifies a petty offense. We distinguished the other case cited by petitioner on other grounds. We also contended that review at this time would be premature because there is no basis for believing that, in light of *Blanton* and *United States* v. *Nachtigal*, 507 U.S. 1, 3 (1993) (per curiam), courts of appeals now would reach a decision contrary to that of the court below.

In *Unterburger*, the Eleventh Circuit agreed with, and followed, the decision of the Seventh Circuit in the instant case and held that defendants who faced a maximum penalty of six months in jail and a $10,000 fine under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248, were not entitled to a jury trial. *Unterburger*, 1996 WL 577591, at *2-*3, citing *Lewis* v. *United States*, 116 S. Ct. 2163 (1996) (reaffirming the *Blanton* presumption and its emphasis on the maximum authorized prison term as the basis for determining whether an offense is serious or petty). This express agreement between the only two courts of appeals that have addressed the issue in the context of the Access Act provides additional evidence that further review of the issue is not warranted.

Respectfully submitted.

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OCTOBER 1996